Supreme Court, U. S.
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No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 23, 1975.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the trial judge which is not reported is printed in Appendix A hereto, infra, p. 1a. The opinion of the Court of Appeals which is not reported is printed in Appendix B hereto, infra, p. 7a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) providing for jurisdiction on writ of certiorari granted to persons appealing from the decision of a United States Court of Appeal.

QUESTIONS PRESENTED

1. Should antitrust immunity under *Parker* v. *Brown* be granted to a business activity because it is referred to in a tariff when there is no legislative imperative nor evidence that a regulatory agency considered the practice?

2. Under what circumstances should a *Parker* v. *Brown* exemption to the antitirust laws be granted by Summary Judgment?

STATUTE INVOLVED

The statutory provision involved is Section 460.6 of the Michigan Compiled Laws ~~(official citation)~~, which is printed in Appendix C at page ~~9~~a.

STATEMENT OF THE CASE

This action is brought under Sections 1 and 2 of the Sherman Act (15 USCA Sections 1 and 2 (1970)), and Section 3 of the Clayton Act (15 USCA Section 14 (1970)) by Plaintiff Lawrence Cantor, who operates a retail drugstore in Detroit, Michigan. The Complaint alleges that Plaintiff has been injured by Defendant Detroit Edison's practice of requiring certain of its customers to pay for light bulbs as a condition to purchasing electric energy. Jurisdiction is based on 28 USCA Section 1337 (1970), conferring jurisdiction on the federal courts with

respect to civil actions arising under the federal antitrust laws.

It is uncontradicted that Detroit Edison ties the sale of light bulbs to the sale of electricity in its market territory of Eastern Michigan, which includes the City of Detroit and its environs. Edison's cost of the bulbs distributed in the tie-in program in a recent two-year period was approximately $5,000,000. The district court, based upon Edison's inclusion of a description of the tie-in within its electricity rate tariff, found the tie-in to be exempt "state action" under *Parker* v. *Brown,* 317 U.S. 341 (1943), and it granted Edison's motion for summary judgment.[1] (See Appendix A). The United States Court of Appeals for the Sixth Circuit on April 23, 1975 adopted the opinion of Judge John Feikens.

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[1] Tariffs and changes in tariffs are generally initiated by the business affected. They become binding either by filing without objections or upon some affirmative action of a regulatory agency. The latter situation exists in this case. There is no legislation in Michigan requiring, directing or authorizing the tie-in, nor is there any rules or regulation requiring all (or any) of Edison's business practices be set forth in a tariff. In support of its motion for summary judgment, Edison produced no affidavits from regulatory officials or material from agency files to show the light bulb program was ever considered or reviewed by the appropriate authorities in Michigan. In depositions, Edison's officers admitted they were unaware of any formal proceedings before a regulatory agency in Michigan in which the light bulb tie-in was considered.

REASONS FOR GRANTING THE WRIT

1. Decisions by the various United States Courts of Appeal have been ". . . dissimilar and often inconsistent . . ."[2] as to the applicable test of law to determine the existence of a state action exemption. Though they use different words and explanations, the Fifth and First Circuits and district courts of the Ninth Circuit allow the exemption only if the state has exercised informed and considered judgment of the practice or activity under attack. General supervisory duty of a regulatory agency over the defendant is not enough. These words are used expressly in *Gaslight Company of Columbus* v. *Georgia Power Co.*, 440 F. 2d 1135, 1139-40 (5th Cir. 1971), *cert. denied* 404 U.S. 1062 (1972):

> "Our view is that the *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subject to meaningful regulation and supervision by the state *to the end that they are the result of the considered judgment of the state regulatory authority,* here the Georgia Public Service Commission." 440 F. 2d at 1139-40 (emphasis supplied).

In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 30 (1st Cir. 1969), *cert. denied* 400 U.S. 850 (1970), the First Circuit said the exemption should be allowed ". . . only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts an alternative form or public regulation." *Whitten* was quoted at length when the

[2] Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 Northwestern L. Rev. 71, 91 (1974)

Fifth Circuit denied a *Parker* exemption in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F. 2d 1286, 1294-5 (5th Cir. 1971), *cert. denied* 404 U.S. 1047 (1972). See also *Marnell* v. *United Parcel Service,* 260 F. Supp. 391, 409-10 (N.D. Cal. 1966), and *International T. & T. Corp.* v. *General Tel. & Elec. Corp.,* 351 F. Supp. 1153, 1199-1203 (D. Hawaii 1972).

The Court of Appeals for the District of Columbia reached a similar conclusion using the state action analysis to resolve a conflict between a District agency and the antitrust laws. *Hecht* v. *Pro-Football, Inc.,* 444 F. 2d 931, 934-42 (D.C. Cir. 1971), *cert. denied* 404 U.S. 1047 (1972).

In contrast, the Fourth Circuit has protected a utility's anticompetitive practice as long as it was covered by an operative tariff with little analysis of the agency's investigating process. *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Company of Virginia,* 480 F. 2d 754 (4th Cir. 1973). In another case the same court granted immunity to another utility's anticompetitive activity merely because the state could have but did not stop it. *Washington Gaslight Company* v. *Virginia Electric Power Co.,* 438 F. 2d 248 (4th Cir. 1970).

With its decision in the instant case and in *Lamb Enterprises* v. *Toledo Blade Company,* 461 F. 2d 506 (6th Cir. 1972), the United States Court of Appeals for the Sixth Circuit has aligned itself with the Fourth Circuit, at least with the *Business Aides* decision if not with *Virginia Electric,* giving credence to the theory that any private action of a state supervised business can constitute state action without a legislative directive or evidence of informed and considered judgment by the state as long as the activity in some way is incorporated in the tariff sheet.

2. The rule of law applied by the court below is improper and conflicts with the decisions of this Court in *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Goldfarb* v. *Virginia State Bar Association, et al.,* slip op. No. 74-70, decided June 16, 1975. Chief Justice Burger in *Goldfarb,* restating *Parker,* held that the state action exemption applies only to *activities* which are *required* by the state acting as a sovereign (slip op. p. 16).

In contrast, the District Court in the instant case quoted the Fourth Circuit holding in *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Company of Virginia, supra,* as the determinative principle of law, to-wit:

> "If (Edison's) action were occasioned by adherence to the rules and regulations of its operative tariffs then it is shielded from liability for any possible antitrust violation." 480 F. 2d at 756. See Appendix A, infra, p. 3a.

The reliance by the Court below on the Fourth Circuit's view of the *Parker* exemption should be examined carefully as it was the Fourth Circuit's opinion that was reversed in *Goldfarb.*

The test relied on by the Court below and the Fourth Circuit makes the question of antitrust exemption for regulated industries turn on whether the utility is operating in accordance with a tariff rather than on whether the utility's business *activity* has been *required* by the state as a sovereign. While in many cases the inclusion of a specific business activity in a tariff may be indicative of state direction, the existence of the tariff is not the end of the inquiry required by *Parker* and *Goldfarb.* To make tariffs sacrosanct permits a regulated business to escape antitrust restraints for any business activity

which it can cover or to which it can make reference in its tariff. Surely, this gaping hole in antitrust enforcement is not intended by this Court. Nor do any decisions hold that the test is the degree of general regulation to which a defendant in an antitrust action is subject, although the Court below viewed this as material.[3] Whether a particular business activity of a regulated company is exempt from the antitrust laws should require that an inquiry be made to determine whether the state, acting as a sovereign, has considered the benefits and burdens of the specific conduct or activity under attack.[4]

3. The question presented is of importance in the administration of the antitrust laws, particularly as they apply to public utilities and other regulated businesses.

---

[3] The trial court, having adopted the tariff sheet theory, was compelled to acknowledge precisely what Petitioner contends, *i.e.,* that the light bulb program may not have been considered by the Michigan Public Service Commission. For, in the final paragraph of his opinion, with some magesterial imprecision, the Court attempts to sweep away the issue presented by this petition stating:

> "The Court agrees with Plaintiff that a state should consider the effects on competition of facilities such as these. But it is the effect of the entire project which must be examined and this is done in proceedings involving franchises and certificates of convenience. Neither statute, case law nor common sense require the state to scrutinize each small facet of a comprehensive scheme for its effect on competition." Appendix A, infra, pp. 4a-5a.

[4] This Court's recent decision in *Gordon et al.* v. *New York Stock Exchange, Inc. et al.,* No. 74-304, slip op. decided June 26, 1975, supports petitioner's view of the applicable law. The decision in *Gordon* in favor of exemption turned on the fact that the S.E.C. had specific statutory authority to regulate commission rates and had for many years prior to commencement of the action been actively studying commission policies of the N.Y.S.E.

There are literally hundreds of federal, state and local agencies which approve tariffs of many kinds of regulated private businesses. Tariffs and the activities of regulatory agencies doubtless have a great impact on the economy.[5] If each of these agencies could confer antitrust immunity with respect to every program incorporated into a tariff sheet there would be great potential for unjustified harm ". . . to the free interaction of market forces (which) produce efficient resource allocation." Kauper, *Department of Justice: Antitrust Prospectives,* 36 U. Pittsburgh L. Rev. 667 (1975).

This Court has often said that approval of a private business activity by the state is not enough to establish antitrust exemption. *E.g., Parker* v. *Brown, supra,* at p. 351; *Ottertail Power Co.* v. *United States,* 410 U.S. 366, 373-375 (1973). The instant case presents an ideal opportunity for this Court to establish meaningful standards in determining the difference between mere authorization or approval on the one hand and direction and command by the sovereign on the other. In this effort, the Court can make it clear to regulators and the industries they supervise the level of investigation and consideration which must be given to business activities—including the effect of those activities on competition—to establish an antitrust exemption.

The problems of regulatory agencies' responsibilities and antitrust immunity currently are of great concern to legal scholars, economists, the affected industries and the

[5] For a discussion of one economist's view of the impact of regulatory agencies see Samuels, *Public Utility Rate Making and Competitive Structure—Carterfone in Jeopardy,* 20 Wayne U. L. Rev. 819 (1974).

Attorney General of the United States.[6] And, in view of the number of cases in this area reaching the U.S. Courts of Appeal recently, their conflicting results, and the numbers of important cases pending in the trial where this is a critical issue, Supreme Court review of this case is appropriate.

[6] See, Samuels, *Public Utility Rate Making and Competitive Structure—Carterfone in Jeopardy,* 20 Wayne U. L. Rev. 819 (1974); Kauper, *Department of Justice: Antitrust Prospective,* 36 U. of Pittsburgh L. Rev. 667 (1975); Kauper, *National Energy Policy and the Antitrust Laws,* 15 Atomic Energy Law Journal, 265 (1974), Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 Northwestern University L. Rev. 71 (1974). Several actions are pending in the federal courts brought by the United States against regulated industries in which the state action defense has been raised. Petitioner is aware of these pending cases: *United States* v. *American Tel. & Tel. Co.,* Civil Action #74-1698, and *United States* v. *Morgan Drive Away, Inc., et al.,* Civil Action ~~#[illegible]~~, both of which are pending in the United States District Court for the District of Columbia.

#74-1761

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MEMORANDUM OPINION
(Filed July 3, 1974)

Plaintiff, the owner of a drug store, sells electric light bulbs and brings this antitrust case charging that the defendant utility company has damaged him in his business.[1] The defendant, The Detroit Edison Company, supplies residential subscribers with electric light bulbs for such homes. Plaintiff claims that this anticompetitive practice injures him since he must sell his light bulbs while defendant replaces these bulbs without charge when they burn out, and thus he contends defendant has violated both the Sherman and the Clayton Acts (more specifically, Section 2 of the Sherman Act, 15 U.S.C. §2, and Section 3 of the Clayton Act, 15 U.S.C. §14). Defendant has moved for summary judgment contending that it is shielded from liability under these federal statutes in that the utility is completely regulated by the Michigan Public Service Commission — that this involvement by the Commission in its business affairs constitutes "state action." It claims arguendo that it is not in violation of these statutes but that if it is in fact in violation, it is shielded from liability.

Plaintiff contends that defendant instituted the free light bulb plan for the sole purpose of increasing electrical consumption, a purely private motive, and that at best the Michigan Public Service Commission has rubberstamped this plan. He adds that the Michigan Public Service Commission receives only sketchy data from defendant regarding this plan, that the Commission has never conducted open hearings on the light bulb program and that it does not regulate any of the administrative details of the program, such as bulb life and wattage.

[1] The complaint purports to be a class action suit, but no class has been certified.

Defendant argues that Michigan law gives the Commission plenary power to regulate utility companies. M.C.L.A. 460.6 provides:

> "It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities."

Defendant says that the Commission issued its order U-3910, dated August 19, 1972, under the authority conferred upon it by this statute and that the order made "lamp supply" a mandatory service under the approved rate structure. Defendant contends that it cannot abandon that service unilaterally and that it must obtain a superseding ruling if it wished so to do. In support of this observation it cites its bulb program for commercial subscribers. Here, before issuing order U-1791 in 1964 giving to the defendant the right to discontinue this specific program, the Commission required the defendant to supply it with substantial financial information including data on the direct costs of that plan.

Thus the question which must be decided in order to determine whether summary judgment lies is whether the defendant's light bulb program can be characterized as state activity or private activity. If this light bulb program is in law state activity, summary judgment in favor of the defendant would be appropriate since in such instances the utility would be shielded from claimed antitrust violations.

In the lead case, *Parker* v. *Brown,* 317 U.S. 341 (1942), the United States Supreme Court held that a cooperative price fixing agreement among California raisin growers did not violate federal antitrust laws if the agreement "derived its authority and its efficacy from the legislative command of the state and was not intended to become effective without that command." 317 U.S. at 350. Cases interpreting *Parker* in the context of utility regulation

have generally reached the same result. When a state agency acts affimatively in approving rates and practices of a utility, there is no antitrust liability.

> "Our view is that the *Parker* exclusion applies to the *rates and practices* of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority." *Gas Light* v. *Georgia Power,* 440 F.2d 1135 (5th Cir. 1971) (emphasis supplied).

This rate structure theory has been succinctly stated:

> "If its actions were occasioned by adherence to the rules and regulations of its operative tariff, then it is shielded from liability for any possible antitrust violation." *Business Aides* v. *Chesapeake Telephone,* 480 F.2d 754 (4th Cir. 1973) at 756.

See also Allstate v. *Lanier,* 361 F.2d 870 (4th Cir. 1966); *Marnell* v. *United Parcel,* 260 F. Supp. 391 (N.D. Cal. 1966).

Applying these principles to the case at bar, it appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.

It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the "rates," "services" and "operation of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the "service rendered" in

proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine.

Plaintiff also contends that a state must consider the effects of a regulated practice on competition before enacting it. To this effect he cites two categories of cases: those involving large corporate mergers [*International Telephone* v. *General Telephone,* 351 F.Supp. 1153 (D. Hawaii 1972) and *U.S.* v. *Pacific Southwest Airlines,* 358 F.Supp. 1224 (C.D. Cal. 1973)], and those involving either fraud or collusive bidding [*Woods Exploration* v. *Alumnium Company of America,* 438 F.2d 1286 (5th Cir. 1971) and *Whitten* v. *Paddock Pools,* 424 F.2d 25 (1st Cir. 1970)].

The case at bar is clearly distinguishable. Despite plaintiff's allegation that defendant is "hiding" the true costs of the bulb program, this court can find no fraud of the type involved in *Woods.* Nor is this a case involving bidding of any type. The telephone and airline cases cited by plaintiff involve situations where one regulated enterprise is attemping to expand by buying or merging with another. In those cases it was necessary to evaluate the effect on competition of the proposed change. That was the central issue.

Here, defendant has already obtained a franchise to do business in every municipality in which it operates, and M.C.L.A. 460.502 *et seq.* provides that any utility seeking to introduce new services or facilities in an area already served must first obtain a certificate of public convenience and necessity. The court agrees with plaintiff that a state should consider the effects on competition of facilities such as these. But it is the effect of the entire project which must be examined, and this is done in proceedings involving franchises and certificates of convenience. Neither statute, case law nor common sense requires the state to scrutinize each small facet of a

comprehensive scheme for its effect on competition. And certainly the court should not step in when the Commission has not even been approached by plaintiff.

Defendant's motion for summary judgment is hereby granted.

An appropriate order may be submitted.

/s/ John Feikens
John Feikens
United States District Judge

Dated: Detroit, Michigan
July 2, 1974

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the Federal Building, City of Detroit, State of Michigan, this 21st day of August, 1974.

Present:

The Honorable John Feikens
District Judge

This matter having come on for hearing upon Motion of Defendant Detroit Edison Company for Summary Judgment; the parties having stipulated that such Motion be initially limited to the "state action exemption" issue; the parties having filed affidavits, depositions, exhibits and briefs on such issue and the Court having heard oral argument thereon; the Court being fully advised in the premises and having rendered a written opinion on July 2, 1974; in accordance therewith:

It Is Ordered And Adjudged, that the Defendant's Motion for Summary Judgment be, and the same hereby

is, Granted, and that judgment be, and the same hereby is, Entered in favor of the above-named Defendant.

/s/ John Feikens
District Court Judge

Approved for Entry:
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APPENDIX B

No. 74-2136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE CANTOR, d/b/a Selden Drugs Co., individually and on behalf of all other retail sellers of light bulbs similarly situated,

Plaintiff-Appellant,

vs.

THE DETROIT EDISON COMPANY,

Defendant-Appellee.

ORDER
(Filed Apr 23 1975)

Before: PECK, McCREE, and LIVELY, Circuit Judges.

The appeal from summary judgment for appellee in an anti-trust action alleging that appellant, who sells incandescent light bulbs at retail, has been injured by Detroit Edison's practice of furnishing to residential customers light bulbs as well as electric energy for a single monthly rate having come on to be heard on the record on appeal and upon the briefs and oral argument of counsel;

And it appearing that in the posture of the case submitted on motion there was no genuine issue as to any material fact and that a question of law was properly before the district court for determination;

And it appearing that the district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice

within the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943);

Upon consideration, it is ordered that the judgment be, and it hereby is, Affirmed for the reasons stated in the memorandum opinion of the district court, filed July 3, 1974.

Entered by order of the court
/s/ John P. Helman
Clerk

APPENDIX C

Statutory Provisions Cited and Quoted

CLAYTON ACT

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 6. The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.

The commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and conferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan Public utilities commission, and defining their powers and duties.

No. 75-122

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX

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Exhibit # 1 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a multipage exhibit setting out all rate sheets filed with the Michigan Public Service Commission, or its predecessor agencies, showing the lamp supply or exchange clause. These documents were covered by Interrogatory No. 9 and described in the depositions as Plaintiff's Deposition Exhibit # 4	213a-269a
Exhibit # 2 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being an advertisement by Edison of the lamp program. This document was also described as Deposition Exhibit # 7	270a-271a
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Edison's Purchase Analysis Report bearing No. M-300206 dated December 18, 1972, Being Edison's analysis covering purchase of bulbs for the lamp program for 1973	369a-380a

RELEVANT DOCKET ENTRIES

DATE	PROCEEDING
1973	
July 6,	Complaint with exhibits filed — summons issued. (Demand for Jury Trial)
Aug. 3,	Answer of deft. Detroit Edison Co., with proof of service filed.
Sept. 19,	Pltfs. first set of written interrogatories to deft., filed.
19,	Motion for temp. injunction and for maintenance of records, with exhibit, filed.
Oct. 23,	DEPOSITION of Lawrence Cantor, filed.
30,	DEFT's motion for summary judgment, with affidavits and proof of service, filed. BA
Nov. 6,	DEFT's answers to pltf's first set of interrogatories, with exhibits and proof of service, filed.
1974	
Jan. 2,	STIP. and order extending time for pltf's brief in response to motion for summary judgment to Feb. 25/74, filed and entered.
11,	STIPULATION as to separation of issues to be determined on deft's motion for summary judgment, filed.
Feb. 27,	DEPOSITIONS of Robert J. Blok, Donald Carrier, Ronald Daniels, George L. Lahodny and William R. Milby, filed.
Mar. 11,	AFFIDAVIT of David L. Nelson, filed. BA
25,	DEFT's reply memo. in support of its motion for summary judgment, with affidavit and exhibits, filed.
27,	ORDER setting time for oral argument of pltf's motion for summary judgment, for April 22/74, filed and entered.

DATE	PROCEEDING
1974	
Apr. 23,	SUBPOENA.
22,	MOTION for summary judgment, heard and taken under advisement.
July 3,	MEMORANDUM opinion granting deft's motion for summary judgment, filed and entered.
Aug. 22,	ORDER granting deft's motion for summary judgment, filed and entered.
29,	NOTICE of Appeal.
1975	
Apr. 23,	OPINION and ORDER of Sixth Circuit Court, Affirming.

COMPLAINT FOR ANTI-TRUST VIOLATIONS
(Filed July 6, 1973)

COUNT I

Now comes LAWRENCE CANTOR d/b/a SELDEN DRUGS CO. Individually and on behalf of all other Retail Sellers of Light Bulbs similarly situated, which Class is described herein Plaintiffs, by Sugar, Schwartz, Silver, Schwartz & Tyler, P.C.; Fohrman, Lurie, Holstein, Sklar & Cottle, Ltd., and Burton I. Weinstein, their attorneys and complaining of the Defendant, alleges as follows:

JURISDICTION

1. This Complaint is filed and these proceedings are instituted under § 4 of the Act of Congress of October 15, 1914, (15 U.S.C. § 15) commonly known as the Clayton Act, to recover treble damages for the injuries which have been sustained by the Plaintiffs and all other persons and entities similarly situated and for injunctive relief as a result of Defendant's violation of § 2 of the Act of Congress of July 3, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act (Count I); and § 3 of the Act of Congress of October 15, 1914 (15 U.S.C. § 14), commonly known as the Clayton Act (Count II).

DEFENDANTS

2. Defendant DETROIT EDISON COMPANY (hereinafter referred to as "EDISON") a corporation existing under the laws of the State of Michigan, is a public utility having been granted by the State of Michigan, an exclusive franchise for the sole purpose of furnishing alternating electric energy service throughout its territory.

3. Within EDISON's marketing territory, it is the sole supplier of electrical energy (electric current). EDISON's marketing rights exist by virtue of the grant of an exclusive franchise to sell electric energy by the State of Michigan in the areas set forth herein.

4. EDISON purchases through interstate commerce the incandescent bulbs distributed to general service customers (residential customers) from various suppliers which suppliers ship the bulbs to Defendant EDISON in interstate commerce.

5. The relevant product for purposes of this suit is incandescent lamps commonly known as light bulbs of standard size and quality.

6. The relevant geographic market for purposes of this suit is all of EDISON's marketing territory including all of Wayne County, portions of Washtenaw, Ingham, Livingston, Monroe and Lenawee Counties; Macomb, Huron, Lapeer, St. Clair, Sanilac and Tuscola Counties; and Oakland County, except Holly Township, in the State of Michigan. Attached hereto and made a part hereof as Exhibit "A" is a map of the area serviced by EDISON; attached hereto and made a part hereof as Exhibit "B" is a list of the territory serviced by Defendant. Exhibit "C" attached hereto and made a part hereof is a list of the cities serviced by EDISON; Exhibit "D" attached hereto and made a part hereof is a list of the villages serviced by Defendant; Exhibit "E" attached hereto and made a part hereof is a list of townships serviced by Defendant.

VENUE

7. The Plaintiff's and Defendant's principal places of business are situated within the Eastern District of Michigan.

PLAINTIFFS

8. Plaintiff LAWRENCE CANTOR d/b/a SELDEN DRUGS CO. operates a retail drug store located in the City of Detroit, Wayne County, Michigan. For many years, Plaintiff has had available for sale, at retail for profit, incandescent light bulbs of the same kind and quality as those provided by EDISON to general service customers (residential customers).

REPRESENTATIVE SUIT

9. Plaintiff brings this action on his own behalf and as representative of a Class of persons and business entities similarly situated to the named Plaintiff who are engaged in the business of selling light bulbs at retail in competition with the Defendant, DETROIT EDISON COMPANY, in EDISON's marketing area.

This action is brought pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure. The persons and businesses of this Class are so numerous that joinder of all Plaintiffs is impractical. Although their identities are unknown to Plaintiff, the notices provided for in Rule 23 of the Federal Rules of Civil Procedure can be given. Except as to the amount of damages sustained by each member of the class and the period of time within which such damages were sustained, all questions of law and fact are common to all members of the Class and predominate over any questions affecting individual Plaintiffs. Named Plaintiff's claims are typical of the Class and it will fairly and adequately represent the interests of all members of the Class. Irreparable harm will result unless this case is permitted to go forward as a class action in that:

A. Numerous small claims will have no other practical means to be brought or,

B. Inconsistent or varying adjudications may result which would establish incompatible standards of conduct for the party opposing the Class or,

C. Adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

D. Defendant has acted on grounds generally applicable to the Class, thereby making appropriate declaratory relief with respect to the Class as a whole. Moreover, the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy herein.

VIOLATIONS ALLEGED AS AGAINST DEFENDANT EDISON

10. For many years, under the terms of the agreement between EDISON and its "general service customers" (residential customers), EDISON has required as a condition to obtaining electrical energy service, that each of these customers pay a monthly rate which includes a charge for incandescent lamps commonly known as light bulbs. EDISON's single rate to general service customers for both electric energy and light bulbs are set forth in the general service rate the most recent of which is attached hereto and made a part hereof as Exhibit "F" (deceptively labeled "energy charge").

11. The requirement by EDISON that a general service customer pay a rate which includes a charge for light bulbs as a condition of purchasing electric energy (a service for which EDISON enjoys an exclusive monopoly) constitutes an illegal "tie-in" requirement in restraint of

trade and commerce in the sale of standard size and quality incandescent light bulbs.

12. Plaintiff's and Class Plaintiffs' available market for the sale of light bulbs at retail for profit is and always has been the same customers who are tied to paying for EDISON's light bulbs by virtue of their being required to pay a rate which includes the cost of bulbs when purchasing electric energy from EDISON.

13. As a direct result of EDISON's unreasonable restraint of trade and attempt to monopolize and monopolization of the sale of standard size and quality incandescent light bulbs in the territory serviced by it, in violation of § 2 of the Sherman Anti-Trust Act, Plaintiff and all other persons and entities similarly situated have been denied a major retail market for light bulbs and thereby, have lost vast sums of money in profits from EDISON's deprivation of their sale of incandescent bulbs in that:

A. Persons who would otherwise purchase light bulbs from Plaintiff and Class Plaintiffs have been required to buy their bulbs from EDISON;

B. Plaintiff and Class Plaintiffs, because of their severely limited sales of bulbs, have been denied the buying power to purchase large quantities of bulbs at wholesale quantity discount prices. This has resulted in their further loss of profits;

C. Plaintiffs and Class Plaintiffs have been denied profits on sales to persons who would otherwise enter upon the premises of Plaintiff and Class Plaintiffs for the purpose of purchasing light bulbs and who would purchase other products in conjunction with their light bulb purchases.

14. During the period involved, Plaintiff and Class Plaintiffs have been injured in their business or property by reason of Defendant's illegal attempt to monopolize, illegal monopolization and tie-in sales requirements in large sums of money, the dollar amounts of which are not presently established but can be determined by the proofs and evidence in this case.

WHEREFORE, Plaintiff, individually and on behalf of all persons and entities similarly situated respectfully request this Court to:

A. Temporarily and permanently enjoin Defendant DETROIT EDISON COMPANY from requiring the purchasing of incandescent bulbs in connection with the sale of electric energy to general service customers.

B. Determine this matter to be a valid class action.

C. Award judgment for Plaintiff and Class Plaintiffs against Defendants for threefold the amount of actual damage sustained as a result of the violations alleged herein or whatever other amount may be just in the premises.

D. Award Plaintiff and Class Plaintiffs reasonable attorneys' fees and costs incurred in prosecuting this action.

E. Grant whatever other relief this Court may deem just in the premises.

COUNT II

Plaintiff, individually and on behalf of all persons and entities similarly situated, realleges and adopts Paragraphs 1 through 14 of Count I as Paragraphs 1 through 14 of Count II.

15. The requirement by EDISON that its general service customers pay a rate which includes a charge for light bulbs as a condition of purchasing electric energy service constitutes an illegal "tie-in" requirement in restraint of trade and commerce in the sale of incandescent light bulbs in violation of § 3 of the Clayton Act.

WHEREFORE, named Plaintiff, individually and on behalf of all persons and entities similarly situated respectfully request this Court to:

A. Temporarily and permanently enjoin Defendant DETROIT EDISON COMPANY from requiring

the purchasing of incandescent bulbs in connection with the sale for electric energy to general service customers.

B. Determine this matter to be a valid class action.

C. Award judgment for Plaintiff and Class Plaintiffs against Defendants for threefold the amount of actual damage sustained as a result of the violations alleged herein or whatever other amount may be just in the premises.

D. Award Plaintiff reasonable attorneys' fees and costs incurred in prosecuting this action.

E. Grant whatever other relief this Court may deem just in the premises.

Sommers, Schwartz, Silver,
Schwartz, Tyler & Gordon,
P.C.
Fohrman, Lurie, Holstein,
Sklar & Cottle, Ltd.
Burton I. Weinstein

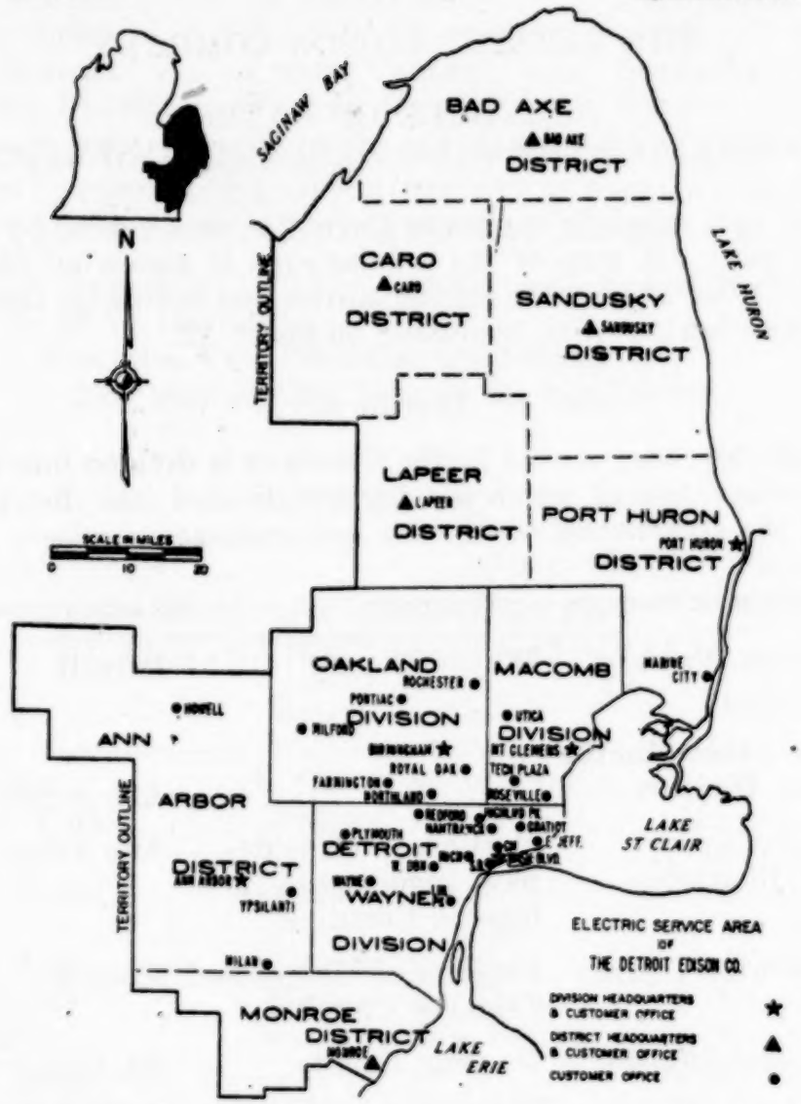
By: (s) David L. Nelson
Attorneys for Plaintiffs

26555 Evergreen, Suite 1602
Southfield, Michigan 48076
352-9870

Dated: July 6, 1973

EXHIBIT A 12a

M.P.S.C. No. 7 Original Sheet No. A1



Issued: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective: August 19, 1972

EXHIBIT B

M.P.S.C. No. 7 Original Sheet No. 1

THE DETROIT EDISON COMPANY

SCHEDULE OF RATES
GOVERNING THE SALE OF ELECTRIC SERVICE

This rate schedule applies to the entire area served by the Company. A map of the service area is shown on Sheet A1. A list of counties, municipalities and townships served is included herewith, beginning on Sheet A2.

Territory

The territory served by the Company is divided into five divisions, two of which are further divided into districts, for the administration of sales and customer services:

DIVISION OR DISTRICT	TERRITORY	HEADQUARTERS
Detroit-Wayne Division	Wayne County	Detroit
Ann Arbor-Monroe Area Division		Ann Arbor
Ann Arbor District	Portions of Washtenaw, Ingham and Livingston Counties	Ann Arbor
Monroe District	Portions of Monroe and Lenawee Counties	Monroe
Macomb Division	Macomb County	Mt. Clemens
Oakland Division	Oakland County, except Holly Township	Birmingham
Thumb Area Division		Port Huron
Bad Axe District	Huron County	Bad Axe
Lapeer District	Lapeer County	Lapeer

DIVISION OR DISTRICT	TERRITORY	HEADQUARTERS
Port Huron District	St. Clair County	Port Huron
Sandusky District	Sanilac County	Sandusky
Caro District	Tuscola County	Caro

THIS RATE SCHEDULE SUPERSEDES AND REPLACES THE RATE SCHEDULE PREVIOUSLY ON FILE AND DESIGNATED AS M.P.S.C. NO. 6

Issued: August 19, 1972 Effective: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

EXHIBIT C

M.P.S.C. No. 7 Original Sheet No. A2

LIST OF CITIES SERVED
BY THE DETROIT EDISON COMPANY

CITY OF	COUNTY	CITY OF	COUNTY
Algonac	St. Clair	Melvindale	Wayne
Allen Park	Wayne	Memphis	Macomb & St. Clair
Ann Arbor	Washtenaw	Milan	Washtenaw & Monroe
Bad Axe	Huron	Monroe	Monroe
Belleville	Wayne	Mt. Clemens	Macomb
Berkley	Oakland	New Baltimore	Macomb & St. Clair
Birmingham	Oakland	Northville	Wayne
Bloomfield Hills	Oakland	Novi	Oakland
Brighton	Livingston	Oak Park	Oakland
Brown City	Sanilac	Orchard Lake	Oakland
Center Line	Macomb	Pleasant Ridge	Oakland
Clawson	Oakland	Plymouth	Wayne
Dearborn	Wayne	Port Huron	St. Clair

CITY OF	COUNTY	CITY OF	COUNTY
Dearborn Heights	Wayne	Richmond	Macomb
Detroit	Wayne	River Rouge	Wayne
East Detroit	Macomb	Riverview	Wayne
Ecorse	Wayne	Rochester	Oakland
Farmington	Oakland	Rockwood	Wayne
Ferndale	Oakland	Roseville	Macomb
Flat Rock	Wayne	Royal Oak	Oakland
Fraser	Macomb	Saline	Washtenaw
Garden City	Wayne	Sandusky	Salinac
Gibraltar	Wayne	South Lyon	Oakland
Grosse Pointe	Wayne	Southfield	Oakland
Grosse Pointe Farms	Wayne	Southgate	Wayne
Grosse Pointe Park	Wayne	St. Clair	St. Clair
Grosse Pointe Woods	Wayne	St. Clair Shores	Macomb
Hamtramck	Wayne	Sterling Heights	Macomb
Harbor Beach	Huron	Sylvan Lake	Oakland
Harper Woods	Wayne	Taylor	Wayne
Hazel Park	Oakland	Trenton	Wayne
Highland Park	Wayne	Troy	Oakland
Howell	Livingston	Utica	Macomb
Huntington Woods	Oakland	Vassar	Tuscola
Inkster	Wayne	Walled Lake	Oakland
Keego Harbor	Oakland	Warren	Macomb
Lapeer	Lapeer	Wayne	Wayne
Lathrup Village	Oakland	Westland	Wayne
Lincoln Park	Wayne	Williamston	Ingham
Livonia	Wayne	Wixom	Oakland
Madison Heights	Oakland	Woodhaven	Wayne
Marine City	St. Clair	Yale	St. Clair
Marysville	St. Clair	Ypsilanti	Washtenaw

In addition the Company serves small areas in the Cities of Wyandotte and Pontiac annexed to these cites from township lands.

Issued: August 19, 1972 Effective: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

EXHIBIT D

M.P.S.C. No. 7 Original Sheet No. A3

LIST OF VILLAGES SERVED BY THE DETROIT EDISON COMPANY

VILLAGE OF	COUNTY	VILLAGE OF	COUNTY
Akron	Tuscola	Kingston	Tuscola
Almont	Lapeer	Lake Angelus	Oakland
Applegate	Sanilac	Lake Orion	Oakland
Armada	Macomb	Leonard	Oakland
Beverly Hills	Oakland	Lexington	Sanilac
Bingham Farms	Oakland	Marlette	Sanilac
Capac	St. Clair	Maybee	Monroe
Carleton	Monroe	Mayville	Tuscola
Caro	Tuscola	Melvin	Sanilac
Carsonville	Sanilac	Metamora	Lapeer
Caseville	Huron	Milford	Oakland
Cass City	Tuscola	Millington	Tuscola
Clarkston	Oakland	Minden City	Sanilac
Clifford	Lapeer	New Haven	Macomb
Columbiaville	Lapeer	North Branch	Lapeer
Deckerville	Sanilac	Ortonville	Oakland
Dexter	Washtenaw	Otter Lake	Lapeer
Dryden	Lapeer	Owendale	Huron
Dundee	Monroe	Oxford	Oakland
Elkton	Huron	Peck	Sanilac
Emmett	St. Clair	Petersburg	Monroe
Estral Beach	Monroe	Pigeon	Huron
Fairgrove	Tuscola	Pinckney	Livingston
Forestville	Sanilac	Port Austin	Huron
Fowlerville	Livingston	Port Hope	Huron
Franklin	Oakland		
Gagetown	Tuscola	Port Sanilac	Sanilac
Grosse Pointe Shores	Wayne & Macomb	Quaker Town	Oakland
Imlay City	Lapeer	Reese	Tuscola
Kinde	Huron	Romeo	Macomb

(Continued on next sheet)

M.P.S.C. No. 7 Original Sheet No. A3a

LIST OF VILLAGES SERVED — Continued
BY THE DETROIT EDISON COMPANY

VILLAGE OF	COUNTY	VILLAGE OF	COUNTY
South Rockwood	Monroe	Webberville	Ingham
Ubly	Huron	Wolverine Lake	Oakland
Unionville	Tuscola	Woodcreek Farms	Oakland

Issued: August 19, 1972 Effective: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

EXHIBIT E

M.P.S.C. No. 7 Original Sheet No. A4

LIST OF TOWNSHIPS SERVED
BY THE DETROIT EDISON COMPANY

TOWNSHIP OF	COUNTY	TOWNSHIP OF	COUNTY
Addison	Oakland	Burtchville	St. Clair
Akron	Tuscola	Canton	Wayne
Almer	Tuscola	Casco	St. Clair
Almont	Lapeer	Caseville	Huron
Ann Arbor	Washtenaw	Chandler	Huron
Arbela	Tuscola	Chesterfield	Macomb
Arcadia	Lapeer	China	St. Clair
Argyle	Sanilac	Clay	St. Clair
Armada	Macomb	Clinton	Lenawee
Ash	Monroe	Clinton	Macomb
Attica	Lapeer	Clyde	St. Clair
Augusta	Washtenaw	Colfax	Huron
Austin	Sanilac	Columbia	Tuscola
Avon	Oakland	Columbus	St. Clair
Berlin	Monroe	Commerce	Oakland
Berlin	St. Clair	Conway	Livingston
Bingham	Huron	Cottrelville	St. Clair
Bloomfield	Huron	Custer	Sanilac
Bloomfield	Oakland	Dayton	Tuscola
Brandon	Oakland	Deerfield	Lapeer
Bridgehampton	Sanilac	Delaware	Sanilac
Bridgewater	Washtenaw	Denmark	Tuscola
Brighton	Livingston	Dexter	Washtenaw
Brockway	St. Clair	Dryden	Lapeer
Brookfield	Huron	Dundee	Monroe
Brownstown	Wayne	Dwight	Huron
Bruce	Macomb	East China	St. Clair
Buel	Sanilac	Elba	Lapeer
Burlington	Lapeer	Elk	Sanilac
Burnside	Lapeer	Elkland	Tuscola

(Continued on next sheet)

M.P.S.C. No. 7 Original Sheet No. A4a

LIST OF TOWNSHIPS SERVED — Continued
BY THE DETROIT EDISON COMPANY

TOWNSHIP OF	COUNTY	TOWNSHIP OF	COUNTY
Ellington	Tuscola	Harrison	Macomb
Elmer	Sanilac	Hartland	Livingston
Elmwood	Tuscola	Highland	Oakland
Emmett	St. Clair	Howell	Livingston
Evergreen	Sanilac	Hume	Huron
Exeter	Monroe	Huron	Huron
Fairgrove	Tuscola	Huron	Wayne
Fair Haven	Huron	Ida	Monroe
Farmington	Oakland	Imlay	Lapeer
Flynn	Sanilac	Independence	Oakland
Forester	Sanilac	Indianfields	Tuscola
Fort Gratiot	St. Clair	Iosco	Livingston
Freedom	Washtenaw	Ira	St. Clair
Fremont	Sanilac	Juniata	Tuscola
Fremont	Tuscola	Kenockee	St. Clair
Frenchtown	Monroe	Kimball	St. Clair
Genoa	Livingston	Kingston	Tuscola
Gilford	Tuscola	Koylton	Tuscola
Goodland	Lapeer	Lake	Huron
Gore	Huron	Lamotte	Sanilac
Grant	Huron	Lapeer	Lapeer
Grant	St. Clair	Lenox	Macomb
Greenleaf	Sanilac	Leroy	Ingham
Green Oak	Livingston	Lexington	Sanilac
Greenwood	St. Clair	Lima	Washtenaw
Grosse Isle	Wayne	Lincoln	Huron
Groveland	Oakland	Locke	Ingham
Hadley	Lapeer	Lodi	Washtenaw
Hamburg	Livingston	London	Monroe
Handy	Livingston	Lynn	St. Clair

(Continued on next sheet)

M.P.S.C. No. 7 Original Sheet No. A4b

LIST OF TOWNSHIPS SERVED — Continued
BY THE DETROIT EDISON COMPANY

TOWNSHIP OF	COUNTY	TOWNSHIP OF	COUNTY
Lyon	Oakland	Pittsfield	Washtenaw
McKinley	Huron	Plymouth	Wayne
Macomb	Macomb	Pte. Aux Barques	Huron
Macon	Lenawee	Pontiac	Oakland
Maple Valley	Sanilac	Port Austin	Huron
Marathon	Lapeer	Port Huron	St. Clair
Marion	Livingston	Putnam	Livingston
Marion	Sanilac	Raisinville	Monroe
Marlette	Sanilac	Ray	Macomb
Mayfield	Lapeer	Redford	Wayne
Meade	Huron	Rich	Lapeer
Metamora	Lapeer	Richmond	Macomb
Milan	Monroe	Riley	St. Clair
Milford	Oakland	Romulus	Wayne
Millington	Tuscola	Rose	Oakland
Minden	Sanilac	Royal Oak	Oakland
Moore	Sanilac	Rubicon	Huron
Mussey	St. Clair	Salem	Washtenaw
North Branch	Lapeer	Saline	Washtenaw
Northfield	Washtenaw	Sand Beach	Huron
Northville	Wayne	Sanilac	Sanilac
Novesta	Tuscola	Scio	Washtenaw
Novi	Oakland	Sebewaing	Huron
Oakland	Oakland	Shelby	Macomb
Oceola	Livingston	Sheridan	Huron
Oliver	Huron	Sherman	Huron
Oregon	Lapeer	Sigel	Huron
Orion	Oakland	Speaker	Sanilac
Oxford	Oakland	Springfield	Oakland
Paris	Huron	St. Clair	St. Clair

(Continued on next sheet)

M.P.S.C. No. 7 Original Sheet No. A4c

LIST OF TOWNSHIPS SERVED — Continued
BY THE DETROIT EDISON COMPANY

TOWNSHIP OF	COUNTY	TOWNSHIP OF	COUNTY
Summerfield	Monroe	Webster	Washtenaw
Sumpter	Wayne	Wells	Tuscola
Superior	Washtenaw	West Bloomfield	Oakland
Tuscola	Tuscola	Wheatfield	Ingham
Van Buren	Wayne	Wheatland	Sanilac
Vassar	Tuscola	White Lake	Oakland
Verona	Huron	White Oak	Ingham
Wales	St. Clair	Williamston	Ingham
Washington	Macomb	Winsor	Huron
Washington	Sanilac	Wisner	Tuscola
Waterford	Oakland	Worth	Sanilac
Watertown	Sanilac	York	Washtenaw
Watertown	Tuscola	Ypsilanti	Washtenaw

Issued: August 19, 1972 Effective: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

EXHIBIT F

M.P.S.C. No. 7 Original Sheet No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate, nor to installations having a demand of over 1000 kilowatts not taking service on this rate prior to the effective date below.

The 1000 kilowatt limitation may be waived for the following cases:

1. For temporary installations where the customer pays the "in and out" charges.
2. For Primary Supply installations during construction while the building is under jurisdiction of the contractor.

Standby service not available under this rate.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/128 volt, three phase four-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
4.50¢ per kilowatthour plus fuel adjustment for the next 85 kilowatthours,

3.80¢ per kilowatthour plus fuel adjustment for the next 900 kilowatthours,
2.80¢ per kilowatthour plus fuel adjustment for the next 9,000 kilowatthours, and
2.20¢ per kilowatthour plus fuel adjustment for the excess kilowatthours.

FUEL ADJUSTMENT: See Schedule Designation B-4.6.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month, less 3% discount for prompt payment.

LAMP SUPPLY: See Schedule Designation B-5.5 (2).

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, or where the investment to serve is out of proportion to the revenue derived therefrom, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910.

ANSWER OF DEFENDANT DETROIT EDISON COMPANY
(Filed August 3, 1973)

Defendant, Detroit Edison Company, by its attorneys answers the Complaint herein as follows:

FIRST DEFENSE

With respect to each of the numbered allegations of the Complaint Detroit Edison Company, hereinafter "Detroit Edison," pleads as follows:

1. Answering paragraph one (1) Detroit Edison, admits that Plaintiff has filed its Complaint and purports to bring these proceedings to recover treble damages and obtain injunctive relief under Section 4 of the Clayton Act (15 U.S.C. § 15). Detroit Edison denies all other allegations contained therein.

2. Answering paragraph two (2) Detroit Edison, admits that it is a corporation existing under the laws of the State of Michigan, and that it is a public utility. Detroit Edison denies all other allegations contained therein.

3. Answering paragraph three (3) Detroit Edison, admits that it is the primary supplier of electrical energy in its marketing territories. Detroit Edison denies all other allegations contained therein.

4. Answering paragraph four (4) Detroit Edison, denies the allegations contained therein.

5. Answering paragraph five (5) Detroit Edison, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

6. Answering paragraph six (6) Detroit Edison, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

7. Answering paragraph seven (7) Detroit Edison, admits the allegations contained therein.

8. Answering paragraph eight (8) Detroit Edison, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

9. Answering paragraph nine (9) Detroit Edison, admits that Plaintiff seeks to bring this action on his own behalf and as a representative of a class of persons defined pursuant to Rule 23 of the Federal Rules of Civil Procedure. Detroit Edison denies the remainder of the allegations contained therein.

10. Answering paragraph ten (10) Detroit Edison, admits that Exhibit "F" sets forth its General Service Rates. Detroit Edison denies the other allegations contained therein.

11. Answering paragraph eleven (11) Detroit Edison, denies the allegations contained therein.

12. Answering paragraph twelve (12) Detroit Edison, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

13. Answering paragraph thirteen (13) Detroit Edison, denies the allegations contained therein.

14. Answering paragraph fourteen (14) Detroit Edison, denies the allegations contained therein.

15. Answering paragraph fifteen (15) Detroit Edison, denies the allegations contained therein.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

This action may not be properly maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

The injury and damages for which relief is sought are an immediate or ultimate consequence of acts which in whole or in part fall within the exclusive jurisdiction of State and/or local regulatory agencies, and are not actionable under the antitrust laws by reason of the "State Action" exception to such laws.

FIFTH DEFENSE

To the extent that Plaintiff claims to have suffered or seeks recovery for any damages allegedly sustained by it prior to July 6, 1969, those claims are barred by the period of limitations set forth in Section 4(b) of the Clayton Act (15 U.S.C. § 15(b)).

SIXTH DEFENSE

The policies and practices of Detroit Edison in regard to the distribution and replacement of electric light bulbs commenced in approximately 1886, and such policies and practices have been and are the result of natural growth and development of a superior product, business acumen and historic accident.

SEVENTH DEFENSE

Any acts, practices or agreements undertaken by Detroit Edison are or have been clearly lawful under heretofore controlling legal doctrines and, at all times, including the times Detroit Edison so acted or undertook such practices or agreements, it relied upon said doctrines. Any ultimate judicial decision declaring or holding any of such acts, practices or agreements unlawful would be an expression of new legal doctrine, and in accordance with established equitable principles, should be given only prospective application.

WHEREFORE, Detroit Edison prays:

1. That the Complaint be dismissed with prejudice; and that judgment be entered for the Defendant.
2. That the Defendant be awarded its costs and such other and further relief as the Court may deem just and proper in the circumstances.

Dated: August 3, 1973

(s) Jerry S. Cohen

Herbert E. Milstein
Michael D. Hausfeld
1776 K Street, N.W.
Washington, D. C. 20006
202/293-7110

Leon Cohan
V.P. — Legal Affairs
Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226

Attorneys for Defendant

Of Counsel:

Harold E. Kohn, P.A.
Attorneys at Law
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Filed October 30, 1973)

Defendant moves that this Court grant a summary judgment in its favor in the above-entitled matter for the reasons stated in the attached "Memorandum in Support of Motion for Summary Judgment" and the affidavits in support thereof.

Dated: November 1, 1973

(s) Jerry S. Cohen

Herbert E. Milstein
Michael D. Hausfeld
1776 K Street, N.W.
Washington, D. C. 20006
(202) 293-7110

(s) Christopher C. Nern

Leon S. Cohan
Legal Department
Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226
(313) 237-8477

Attorneys for Defendant

Of Counsel:

Harold E. Kohn, P.A.
Attorneys at Law
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-9900

Affidavit of Ronald Daniels in Support of Defendant's Motion for a Summary Judgment

STATE OF MICHIGAN
ss.
COUNTY OF WAYNE

RONALD DANIELS, being first duly sworn, deposes and says as follows:

1. That I am Director of the Rate and Revenue Requirement Department of The Detroit Edison Company, having previously been Assistant Director.
2. That I have been employed in the Rate and Revenue Requirement Department since 1961, and that since then I have become familiar with all of the activities of that Department.
3. That it is the function of the Rate and Revenue Requirement Department to perform studies and analysis of the Cost of Service for the different classes of customers of The Detroit Edison Company, including economic studies, load research, load administration and rate research.

4. That the work performed by the Rate and Revenue Research Department as indicated in paragraph (3) yields various work products which are incorporated into documentation which is ultimately submitted to the Michigan Public Service Commission for review in conjunction with filings for various rate adjustments.

5. That all of the rates for electric service which are charged by The Detroit Edison Company are now and since 1909 have been subject to the approval of the Michigan Public Service Commission or its predecessors.

6. That since 1886, the rates for both domestic and general service customers have included an amount which constitutes an allowance for the cost of incandescent lamps which are exchanged by Detroit Edison customers.

7. That the amount which constitutes the allowance for the cost of incandescent lamps exchanged is not computed in a manner which affords The Detroit Edison Company a profit on those lamps which are exchanged, but rather than this amount is figured similarly to the expenses incurred for labor or fuel costs.

8. That on many occasions the Michigan Public Service Commission has reviewed Detroit Edison's customer service programs, including among others, the lamp exchange program and the appliance repair program.

9. That never has the Michigan Public Service Commission determined that the lamp exchange program was either unreasonable or otherwise unlawful.

10. That it is my understanding that the lamp exchange program was initiated to provide easy access to replacement lamps for customers whose lamps had burned out as well as the encouragement of the use of incandescent lamps so as to ultimately encourage the use of electricity in the homes, offices and businesses of Detroit Edison customers.

11. That the benefit derived by Detroit Edison customers from this lamp exchange program is a lower cost of lamps resulting from increased purchases arranged by Detroit Edison.

12. That The Detroit Edison Company makes no direct profit from the exchange of lamps, but that the only purpose of the lamp exchange program has been historically, and is presently, one of service to Detroit Edison customers.

13. That the vast majority of the expenses related to the lamp exchange program is the cost incurred in the purchase of lamps, however, certain additional expenses result from the administration of the program.

14. That the cost of the lamp exchange program is directly related to the demand placed upon Detroit Edison by its customers for lamps and that since rates are based upon test year data, rates accurately reflect the actual operating experience, that is as demand for lamps decreases, the cost of the program decreases, which in turn is reflected in a decreased cost of service and ultimately a decrease in rates.

15. That likewise, an increase in the use of the program will result in an increase in the cost of service, and therefore, ultimately a possible increase in rates.

16. That even if the lamp exchange program were eliminated, that would not mean that certain related expenses, such as, cost of personnel employed in the Customer Offices, would decrease.

17. That in the present rate case, U-4257, Detroit Edison has included a direct expense of Two Million Eight Hundred Thirty Five Thousand Dollars ($2,835,000.00) for the lamp exchange program plus certain allocation of monies to cover the cost of marketing personnel, as well as other administrative general expenses, incurred in the program.

18. That it is my understanding that The Detroit Edison lamp exchange program has not in the past been considered or is not presently considered as a profit making program, but rather merely a customer service which has been continued in an effort to establish good customer relations.

AND FURTHERMORE, Affiant sayeth not.

(s) Ronald Daniels

• • •

Affidavit of William Milby in Support of Defendant's Motion for a Summary Judgment

STATE OF MICHIGAN
ss.
COUNTY OF WAYNE

I, WILLIAM R. MILBY, being first duly sworn, depose and say as follows:

1. THAT I am the Assistant Vice President of Customer and Marketing Services Department and Manager-Customer Services for The Detroit Edison Company.

2. THAT I have been employed by The Detroit Edison Company for 44 years, all of these 44 years having been spent in various customer service activities.

3. THAT I became Assistant to the Director of Customer Services in 1947, Assistant Director in 1954, Director of Customer Services in 1958 and Assistant Manager of Customer Services in 1960, and that in 1967, I became Manager of Customer Services and have been in my present position since 1970.

4. THAT within my area of responsibility is the lamp exchange program and that I am well acquainted and very familiar with this program both presently and as it has existed in the past.

5. THAT The Detroit Edison Company considers the lamp exchange program one of its most important customer services and that the program has received the most local and national publicity of any Detroit Edison customer service.

6. THAT the lamp exchange program began in the early 1900's and has grown over the years in relation to the increase of Detroit Edison customers.

7. THAT from a search of the records of The Detroit Edison Company, I have determined that the number of lamps exchanged through the program over the past ten years to be:

1972 — 18,564,381	1967 — 14,858,655
1971 — 17,996,798	1966 — 14,655,697
1970 — 17,374,123	1965 — 14,360,737
1969 — 16,414,864	1964 — 14,364,814
1968 — 15,968,267	1963 — 14,557,233

8. THAT in 1963, the average number of lamps exchanged per Detroit Edison customer was 10.09, and that in 1972 this figure was 11.17.

9. THAT the annual increases in the exchange of lamps reflects several factors, more particularly an increase in the number of lamp sockets present in the home, office or store, vastly improved lighting techniques as well as an increase in demand for the safety and security provided by proper lighting.

10. THAT as well as for the reasons indicated in paragraph 9, the lamp exchange program has grown primarily because the number of Detroit Edison customers has grown.

11. THAT my understanding of the historical basis of the lamp exchange program was one of practical necessity, more particularly an effort to acquaint Edison customers with the improved lighting provided by electric lamps as well as to make certain that the use of electricity was encouraged by the elimination of empty lamp sockets in the homes, stores and offices of Edison customers. To this extent, the Detroit Edison Company until 1954, provided for the actual delivery of the lamps to its customers at their homes or places of business.

12. THAT it is my understanding that the Detroit Edison Company values good customer relations and considers its lamp exchange program as a symbol of the Company's desire to provide good service to our customers.

13. THAT the lamp exchange program conducted at a low cost, has been the single most important source of good customer relations.

14. THAT the lamps which are presently given to Detroit Edison customers in the lamp exchange program are specially manufactured for the Detroit Edison Company by the General Electric Company.

15. THAT the Detroit Edison Company decided to have General Electric specially manufacture lamps for exchange in order to provide our customers with a good quality bulb and that therefore lamps manufactured to Detroit Edison specifications have a 56% longer life than standard bulbs with only an 8% reduction in light output.

16. THAT the decision to have longer life lamps specially manufactured for Detroit Edison was the result of an evaluation of longer lamp life against some loss in light output, given the fact that customers have frequently requested longer life lamps.

17. THAT the Detroit Edison Company has selected an 1350 hour lamp in order to provide the best combination of lamp life and efficiency.

18. THAT I am familiar with certain surveys conducted regarding participation in the lamp exchange program.

19. THAT in 1955, a survey conducted by Central Surveys of Shenandoah, Iowa, indicated that 95% of The Detroit Edison customers surveyed made use of the lamp exchange program.

20. THAT in 1970, a survey conducted by The Detroit Edison Customer and Marketing Services Department, Marketing Aanalysis Division, indicated that the average Detroit Edison customer exchanged lamps twice per year, and that also 94% of Detroit Edison customers used the lamp exchange program. Additionally, the survey determined that 5% of our customers exchanged their lamps at agencies established in drug stores or hardware stores, and that the balance of our customers exchanged their lamps at our customer offices.

21. THAT presently there are approximately 171 different types of lamps manufactured and sold within the United States which are generally used in residences and small commercial locations.

22. THAT Detroit Edison does not exchange all of these 171 types of lamps, but rather the exchange program is limited to the exchange of 14 types of lamps: 25, 60, 75, 100, 50/100, 50/250, 150A, 200A, 100/300, 100RS, 300 IF Med, 300 KF Mox, 500, 750 BP, 1000 BP.

23. THAT the Detroit Edison exchange program within the geographical area in which Detroit Edison provides electrical energy accounts for about 50% or less of all such lamps purchased or supplied within this area and that if a comparison were made which included fluorescent and high intensity discharge lamps, then Detroit Edison's incandescent exchanges represent only about 23% of the total sold or supplied with The Detroit Edison service area.

24. THAT the lamp exchange program was and has been continued to fill the growing needs of Detroit Edison customers as well as to foster good customer relations, and that the lamp exchange program has proven itself to have a very high customer relations value.

25. THAT, furthermore, and in conclusion, to the best of my knowledge there has never been any intent on the part of The Detroit Edison Company to monopolize the sale or exchange of lamps within its service area, and that the sole factors which initiated and increased the lamp exchange program were (1) a matter of tradition, and (2) a matter of public relations, (3) as well as providing for increased customer service.

AND FURTHERMORE, Affiant sayeth not.

(s) William R. Milby (L. S.)

• • •

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF WRITTEN INTERROGATORIES

(Filed November 6, 1973)

INTRODUCTION

Many of the requests for documents, materials, and information contained in the Plaintiff's Interrogatories involved materials too voluminous to be attached to these answers. Others required an examination of voluminous business records. The burden of deriving or ascertaining the

information sought in said interrogatories is substantially the same for the Plaintiff as it is for the Defendant. Therefore, Plaintiff will be afforded a reasonable opportunity to examine and inspect such records and make copies thereof.

Such materials and information to be available as specified above and as more particularly set forth in the answers to individual interrogatories will be made available for inspection and copying at the offices of The Detroit Edison Company, 2000 Second Avenue, Detroit, Michigan 48226, or at Detroit Edison's district offices as indicated, on reasonable notice, during regular business hours.

INTERROGATORY #1: State the name and location of all of Detroit Edison's light bulb distribution centers, offices, branches or agents during the four (4) year period prior to July 6, 1973?

ANSWER: A list of all said centers, offices, agents and branches as of July 6, 1973 is attached hereto as Exhibit "1". In regard to those centers, offices, agents and branches existing during the four (4) year period prior thereto, records are available indicating this information by individual district at each of the following district offices indicated:

Detroit-Wayne — 300 Washington Blvd., Detroit
Ann Arbor — 401 S. Main Street, Ann Arbor
Monroe — 111 E. First Street, Monroe
Thumb Area — 600 Grand River Street, Port Huron
Macomb — 74 S. Gratiot Avenue, Mt. Clemens
Oakland — 220 E. Merrill Street, Birmingham

(a) State the quantity (by size and type of bulbs) distributed by each of said centers, offices, branches or agents to general service customers for the period commencing July 6, 1969 to July 6, 1973, and state a yearly breakdown for each location?

ANSWER: It is not possible to break down the quantities distributed by each center, office, branch or agent by size or type of lamps. Certain information of this nature

may be obtained only from the examination of voluminous records maintained at the aforementioned district offices. Such records will be made available to Plaintiff at such offices upon reasonable notice during regular business hours.

(b) Identify the manufacturers of the bulbs distributed by Defendant in the named period?

ANSWER: The manufacturers of bulbs distributed during said period are as follows:

1. General Electric Company
2. Westinghouse Electric Company
3. Sylvania Electric Products Company

(c) State whether or not the bulbs distributed by Defendant to its customers differed in quality from standard incandescent bulbs regularly manufactured by the manufacturing concerns as listed in your answer to question 1(b), supra, for residential usage?

ANSWER: Detroit Edison lamps are generally of the same quality as standard incandescent lamps regularly manufactured for residential usage by the suppliers listed in answer to Interrogatory (b), with the following exceptions: Standard lamps generally have a life of 750 hours. The lamps used in Detroit Edison's exchange program have a life of 1,350 hours, however, lumen output of Edison lamps is approximately 8% less than standard lamps.

(d) If your answer to paragraph 1(c), supra, is in the affirmative, please describe each difference in detail?

ANSWER: See answer to 1(c).

INTERROGATORY #2: State whether or not Edison maintains records of the names and addresses of those general service customers who obtain light bulbs from Defendant?

ANSWER: Edison does not maintain such records.

(a) If the answer to Interrogatory #2, supra, is in the

affirmative please state for what periods of time said records are maintained?

ANSWER: Not Applicable.

(b) If the answer to Interrogatory #2 is in the affirmative, state how and where such information is maintained?

ANSWER: Not Applicable.

(c) If the answer to Interrogatory #2 is in the affirmative, state what type of information is maintained; and by way of example (without limitation upon the generality of the foregoing) does such record or records contain information with respect to the number of bulbs obtained by each customer with respect to the names of distributors from whom obtained, with respect to source of such bulbs, with respect to the size and type of bulbs obtained, or with respect to the periods of time for which such bulbs were obtained? Please attach copies of typical media (including photos of cathode ray or similar output) containing such information?

ANSWER: Not Applicable.

INTERROGATORY #3: Please state the names and addresses of the persons, firms or suppliers from whom Edison purchased for distribution to its general service customers, incandescent light bulbs for the period beginning July 6, 1969 through July 6, 1973?

ANSWER: Purchases of incandescent lamps were made from the following suppliers.

General Electric Company
15135 Hamilton
Highland Park, Michigan 48203

Westinghouse Electric Company
21610 Meyers Road
Oak Park, Michigan 48237

Sylvania Electric Products Company
10800 Ford Road
Dearborn, Michigan 48126

(a) State the quantity of each type and size bulb purchased from such supplier for the named period for distribution to general service customers?

ANSWER: The information from which the answer can be derived will be made available to Plaintiff as set forth in the Introduction.

(b) With regard to bulbs purchased for distribution to general service customers, state the prices paid by Edison to each supplier for each size bulb, giving the date of said payment and the quantity of each type bulb purchased for the named period?

ANSWER: Prices paid to each supplier for each size bulb are set forth in Exhibit "2" attached hereto. The information from which the balance of the answers can be derived will be made available to Plaintiff as set forth in the Introduction.

(c) State whether or not Edison received any price discount, rebate or credit of any kind with respect to its purchases of bulbs for distribution to general service customers from any of its suppliers from the period July 6, 1969 to July 6, 1973?

ANSWER: Yes.

(d) If the answer to Interrogatory 3(c) is in the affirmative, state the amount, the date, the supplier and the basis upon which each said discount, rebate or credit was determined?

ANSWER: See Exhibit "3" attached hereto. Copies of such material are available for inspection and copying as set forth in the Introduction.

INTERROGATORY #4: Attach as Exhibits, copies of all of Edison's advertisements which discuss the light bulb

program for the period beginning July 6, 1969 through July 6, 1973?

ANSWER: Detroit Edison's Lamp Exchange Program has never been the single feature of any specific advertisement. Certain radio advertisements, brochures and special letters designed to acquaint new and existing customers with Edison's customer service policies including the lamp exchange program were distributed during the period beginning July 6, 1969 through July 6, 1973.

(a) State how each advertisement was utilized, for example, whether it was mailed to each general service customer, and if so the date that it was so mailed and whether or not it was included in any mailing to the customer with his regular bill?

ANSWER: See Answer to Interrogatory #4.

INTERROGATORY #5: Please attach as Exhibits all general service rate filings made by Edison which evidence or show the amount of expense allocated to the light bulb program for the years 1967, 1968, 1969, 1970, 1971, 1972 and 1973?

ANSWER: During the period (1967-1973), The Detroit Edison Company has had the following general rate cases:

MPSC #	TEST PERIOD
U-3189	12 mos. ending 12/31/68
U-3697	12 mos. ending 7/31/70
U-3910	12 mos. ending 6/30/71
U-4257	12 mos. ending 9/30/72

All work papers and other materials used in the preparation of these findings will be available to Plaintiff pursuant to the Introduction thereto.

INTERROGATORY #6: State separately for the years 1967 through July, 1973 Edison's cost per year with respect to the light bulb program including the following:

(a) The cost of bulbs purchased excluding rebates, discounts or credits?

ANSWER: Such costs are not segregated. Information and materials from which the information can be ascertained will be made available to Plaintiff pursuant to the Introduction to the Interrogatories.

(b) The cost of bulbs purchased minus rebates, discounts and credits?

ANSWER:

1967	$1,699,874
1968	$1,896,643
1969	$1,944,148
1970	$2,134,634
1971	$2,265,311
1972	$2,363,328
1973 (7 months)	$1,107,290

(c) Advertising expense?

ANSWER: None.

(d) Distribution costs? State separately amounts paid to bulb agents?

(e) Accounting costs?

(f) Administration expenses?

(g) Itemized miscellaneous expense?

ANSWER: These expenses are included in various functional accounts and are not specifically segregated.

INTERROGATORY #7: State the amount of inventory of incandescent bulbs allocated to general service customers currently on hand (September 15, 1973)?

ANSWER: Total inventory on hand as of June 19, 1973 was 1,307,601 lamps.

(a) Please state the anticipated length of time that said inventory will meet the demands of general service customers?

ANSWER: This is approximately a one month supply.

INTERROGATORY #8: State the names of the officers of Edison who are the most familiar with the light bulb program and with respect to each state the place where their office is maintained?

ANSWER: The names of Detroit Edison officers who are most familiar with the Lamp Exchange Program are as follows:

George L. Lahodny — Executive Vice President
Customer & Marketing Services
Department — 383 WCB

Paul A. Duker — Vice President
Customer & Marketing Services
Department — 383 WCB

William R. Milby — Assistant Vice President
Customer & Marketing Services
Department — 383 WCB

Robert W. Lundgren — Vice President
Purchase and Real Estate
Department — 483 WCB

INTERROGATORY #9: Please attach as exhibits any and all orders of the Michigan Public Service Commission or any other Michigan agency or commission, which gives, grants or states approval of the current method of marketing light bulbs to general service customers?

ANSWER: The information requested will be made available to Plaintiff pursuant to the procedures in the Introduction.

INTERROGATORY #10: Please attach as Exhibits a copy of the Charter, License, Permit or Grant of Authority issued by the Michigan Public Service Commission, or by any other commission or agency of the State of Michi-

gan, which licenses Edison to conduct business in the territory described in the Complaint as a public utility?

ANSWER: The information requested will be made available to Plaintiff pursuant to the procedures in the Introduction.

INTERROGATORY #11: State the caption, dates of filing, the name of the court, and the case number of any and all other lawsuits previously filed?

(a) Attacking the legality of any aspect of the light bulb program?

(b) Alleging Edison's light bulb program to be a violation of the Sherman or Clayton Act or any other State or Federal anti-trust law?

ANSWER: CHARLES GILL, *et al* vs.
THE DETROIT EDISON COMPANY
Wayne County Circuit Court
73-230257-CZ
Filed: February 22, 1973

INTERROGATORY #12: Please state the reason why the light bulb expense is included under the caption, "customer installation expense" (this is believed to be account number 587) in rate filings made by Edison?

ANSWER: FPC — CUSTOMER INSTALLATIONS EXPENSES

"This account shall include the cost of labor, materials used and expenses incurred in work on customer installations in inspecting premises and in rendering services to customers of the nature of those indicated by the list of items hereunder,"

Labor:

Item 5 — Installing, removing, renewing, and changing lamps and fuses.

Materials and Expenses:

Item 11 — Lamp and fuse renewals.

All accounting procedures are set up pursuant to procedures established and required by the Federal Power Commission. The foregoing is taken from FPC directions.

(a) For how many years was the light bulb program expense carried under the heading "customer installation expense"?

ANSWER: Since the inception of the above indicated classification of accounts by the FPC in 1937 — 36 years.

(b) Please state the name and dates of all previous accounts under which the expenses of the light bulb program was included in rate filings?

ANSWER: All of the accounts are Customer Installation expenses.

1961 — to date	587	FPC Classification
1937 — 1960	762.2	FPC Classification
Prior to 1937	44 B1	DE Classification

INTERROGATORY #13: Please state whether or not the Defendant, Edison, ever received any opinion of in-house counsel as to whether or not the light bulb program violated any of the anti-trust laws of the State of Michigan or of the United States? If such opinion was written, attach a copy of it to your answer? If such opinion was oral, please state the date of such report and by whom and to whom it was given?

ANSWER: No.

INTERROGATORY #14: What is the criteria for selection of light bulb distribution agents or centers, convenience of customers and location? Are there any territorial divisions with respect to such agents or centers?

ANSWER: Customer convenience generally determined by location. No territorial divisions.

INTERROGATORY #15: State whether or not general service customers ever had an option to pay a rate which did not include a charge for incandescent light bulbs?

ANSWER: An examination of interrogatories 15, 16 and 17 indicates a confusion on the part of Plaintiff in regard to the difference between "general service" customers and "domestic" customers. The distinction between the two classifications is as follows: There are two rate classes for commercial customers, "general service" and "large general service." The "domestic" rate class includes all residential customers. Therefore, with this explanation, and in the belief that the Plaintiff has used "general service" in interrogatories 15, 16 and 17 to mean "domestic," the following answers are given:

General Service — Yes.
Domestic — No.

INTERROGATORY #16: If your answer to Interrogatory 15, supra, is in the affirmative, please state the date on which the program was changed and the reason for such change?

ANSWER: See Answer #15 above.

INTERROGATORY #17: Please state whether or not commercial customers of Edison pay a rate for electric current which includes a charge for light bulbs?

ANSWER: Detroit Edison has two rate classes for commercial customers, General Service and Large General Service. Approximately as of August, 1973, 111,500 customers purchased electricity on the General Service Rate, and 5,500 commercial customers purchased service on the Large General Service Rate. Incandescent lamp exchange service is available to customers served on the General Service Rate. Lamp exchange service is *not* available to Large General Service commercial customers.

(a) If your answer to the above is negative, please state how a commercial customer can receive incandescent light

bulbs from the Defendant. Attach copies of all forms utilized for these purposes?

ANSWER: Large general service customers may purchase incandescent lamps from Detroit Edison if they so desire. DE Form in Exhibit "5" is used only to release lamps from stock.

(b) State the amount charged to commercial customers for the purchase of incandescent light bulbs from Detroit Edison?

ANSWER: The prices at which large general service customers may purchase lamps are shown in Exhibit "5".

INTERROGATORY #18: During the period commencing July 6, 1969 through July 6, 1973, please state the number of customers who obtained light bulbs pursuant to the light bulb program?

ANSWER: Detroit Edison does not maintain a statistical list on the number of customers who obtained light bulbs pursuant to the Lamp Exchange Program, nor is data available for the half year periods suggested.

INTERROGATORY #19: Has Edison ever conducted or caused to be conducted any studies with respect to the use of the bulb service, or with respect to the amount of usage of such service, or with respect to the cost of such service? If so, when and by whom were such studies conducted?

ANSWER: In May of 1970, a survey on the use of customer offices was conducted by the Market Analysis Division of Detroit Edison. In January, 1955, a survey was made by Central Survey Incorporated of Shenandoa, Iowa, to determine customer attitudes.

INTERROGATORY #20: If your answer to Interrogatory 19 is in the affirmative, please attach all reports, writings, presentations, notes, charts, computations or other written matter containing, describing or referring to such studies?

ANSWER: Such information may be obtained as indicated in the Introduction hereto.

INTERROGATORY #21: State whether or not there are any limits or restrictions on general service customers with respect to:

(a) The size or quantity of bulbs?

ANSWER: General guidelines for the quantity of lamp bulbs available on our Edison Exchange Program are shown in the attached Exhibit #4 Customer Relations Routine Instruction B-101, Page 6 as indicated on this exhibit.

(b) Proof of the customers entitlement to receive bulbs?

ANSWER: The proof of entitlement for the lamp exchange transaction is generally the presentation of a current electric bill indicating the needed KWHR information. The absence of an electric bill, by itself is never sufficient reason to refuse to exchange lamps. Some identification by name and address easily confirmed from our customers records is an acceptable substitute. In certain instances involving General Service customers, usually chain stores, apartments and office buildings, a letter on the customer's stationery authorizing an employe to exchange lamps is encouraged.

(c) With respect to the return of used bulbs?

ANSWER: Normally, customers exchange lamps on a 1 to 1 basis with the return of used burned out lamps. Reasonable exceptions to this are frequently made at the discretion of the Customer Office Representative and when a new customer desires an initial supply of incandescent exchange list lamps.

INTERROGATORY #22: Does Edison market or sell any incandescent bulbs to general service users other than those distributed through the so-called "free" bulb program?

ANSWER: Detroit Edison sells certain specialty lamps through its customer offices.

INTERROGATORY #23: Does Edison, or can it, estimate on a periodic basis the amount of electric energy consumed through the use of incandescent light bulbs by:

(a) All of its customers?
(b) Its general service users?

ANSWER: Detroit Edison does not make such estimates. As to whether Detroit Edison can make such estimates, Edison officials have not yet been able to determine a reliable formula upon which such estimates could be made and, furthermore, such information is not relevant to this lawsuit.

INTERROGATORY #24: Does Edison, or has it, marketed, sold or distributed any other service, product or goods through any of the centers, distribution points or agents who distribute its light bulbs? If your answer is in the affirmative, please state and describe such service and goods as are marketed through these centers?

ANSWER: Detroit Edison customer offices listed in Interrogatory #1 normally handle all customer business activities. These include bill payments, on the spot domestic portable appliance repair, accepting domestic and commercial portable appliances for shop repair, answering billing inquiries, lamp exchange and all other customer business functions incident to the relationship of the Company to its customers.

In the past years, ranges, dryers and water heaters and certain domestic portable appliances were sold to our customers through customer offices. Several years ago the sale of domestic portable appliances was discontinued. Earlier this year, the sale of major appliances was discontinued except for the disposition of electric water heater inventories expected to be fully depleted by about October 15, 1973. After this date, no merchandise except the specialty lamps described in Interrogatory #22 and the sale of incandescent lamps on the Exchange Program to commercial customers described in Interrogatory #17 will be sold through Edison customer offices.

INTERROGATORY #25: Has the light bulb service program ever been discussed at meetings of the Board of Directors of Detroit Edison?

(a) If so, please state when and attach those portions of the minutes of those meetings which discuss the program during the period from July 6, 1969 to July 6, 1973?

ANSWER: A search of the minutes of Detroit Edison Board of Directors meetings did not disclose any reference to the Lamp Exchange Program during the period from July 6, 1969 to July 6, 1973.

INTERROGATORY #26: Is there a committee in upper management at Edison which deals with the light bulb distribution program?

(a) If so, what is this committee called?

(b) What is the membership of that committee at the present time?

(c) What has the membership of the committee been for the last five years?

(d) When and where does the committee meet?

(e) Are any minutes kept of its meetings?

(f) If no minutes are kept, are any informal memoranda or documentation of these meetings kept?

(g) If either minutes or informal memoranda are kept with respect to said committee meeting, please attach copies to your answers to these interrogatories?

ANSWER: There is no special committee of upper management at Detroit Edison which deals primarily with the Lamp Exchange Program.

INTERROGATORY #27: Are there any intra-company directives issued with regard to light bulb distribution?

(a) Has any such directive been issued during the period from July 6, 1969 to July 6, 1973?

(b) Are there any directives or memorandum issued to light bulb distribution agents?

(c) Were any such intra-company directives or memorandum issued to light bulb distribution agents for the period of July 6, 1969 to July 6, 1973?

(d) Please attach copies of any directives so issued in the stated period?

ANSWER: The only intra-company directive relative to lamp distribution is B-101, attached hereto as Exhibit "4".

INTERROGATORY #28: Do you have in your possession any price lists issued by light bulb manufacturers setting forth the price of light bulbs?

ANSWER: Yes.

INTERROGATORY #29: Does Edison have any contracts with light bulb manufacturers to supply light bulbs to Detroit Edison?

ANSWER: Yes.

(a) If so, please state the names of the manufacturers with which Edison has or has had such contracts?

ANSWER: Purchase contracts have been in effect with the following manufacturers.

1. General Electric Company
2. Westinghouse Electric Company
3. Sylvania Electric Products Company

(b) Attach a copy of all contracts with manufacturers

for the supply of light bulbs for the last four (4) years and with respect to each state:

(1) Who negotiated these contracts for Detroit Edison?

ANSWER: Said purchase orders for each period are available for inspection as indicated in the Introduction hereto.

INTERROGATORY #29(b)(1):

ANSWER: Contracts were negotiated by the following Detroit Edison buyers.

Years 1969 and 1970 — Robert L. Brown
Years 1971, 1972 and 1973 — Donald J. Carrier

(2) Who negotiated these contracts for the various manufacturers named herein?

ANSWER: Manufacturers' lamp contract negotiations were conducted by the following:

General Electric Company
Mr. Todd Bower
Years (1969-1973)

Westinghouse Electric Company
Mr. W. Johnson
Years (1969-1970-1971)
Mr. W. Sheehy
Years (1972-1973)

Sylvania Electric Products Company
Mr. W. Davis
Years (1969-1973)

STATE OF MICHIGAN

ss.

COUNTY OF WAYNE

CHRISTOPHER C. NERN, being first duly sworn, on oath, deposes and states that he is one of the attorneys for Detroit Edison Company in this proceeding; that he is authorized to make the preceding responses to written interrogatories on its behalf; that the foregoing answers set forth or information as is available to Detroit Edison Company is in accordance with the requirements of the Federal Rules of Civil Procedures, obtained under his direction and supervision; and that the foregoing answers are true and correct to the best of his knowledge, information and belief.

(s) Christopher C. Nern

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STIPULATION AS TO SEPARATION OF ISSUES TO BE DETERMINED ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Filed January 11, 1974)

NOW COME the parties hereto by their respective counsel, and stipulate and agree that the issues to be considered and determined by the Court on Defendant's Motion for Summary Judgment, dated November 1, 1973, shall be separated for purposes of discovery, briefing, and decision that only the following issues shall now be briefed and argued, to wit:

Whether or not Defendant Detroit Edison Company's (Edison's) method of marketing certain light bulbs, as described in Plaintiff's Complaint, is exempt from the application of the Sherman and Clayton Acts, as proposed by Edison on pages 4-10 of the Defendant Edison's memorandum in support of its motion for Summary Judgment.

The parties hereto further stipulate and agree that the Court should consider in determining the issue set forth

above, only the Affidavits of Ronald Daniels and William Milby and pages 1-10 of Defendant's Memorandum in Support of its Motion for Summary Judgment, and such memorandum, evidence, and argument, relative to that issue that may be filed by Plaintiff and/or Defendant in support or in opposition.

In the event that Edison is denied its Motion for Summary Judgment on the issue herein stated Plaintiff and Defendant shall be entitled to additional discovery and to submit additional evidence, memorandum, and argument to the Court in opposition and in support of the remaining grounds for Summary Judgment set forth in Edison's Motion for Summary Judgment within such times as the Court may direct.

LAWRENCE CANTOR, d/b/a Selden Drugs Co., Individually and on Behalf of all other retail sellers of light bulbs similarly situated
By: (s) Michael L. Sklar

THE DETROIT EDISON COMPANY
By: (s) Jerry S. Cohen

January 11, 1974

AFFIDAVIT OF DAVID L. NELSON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
(Filed March 11, 1974)

STATE OF MICHIGAN

ss.

COUNTY OF OAKLAND

David L. Nelson after having first been duly sworn deposes and says that he is one of the attorneys for the Plaintiffs in the instant action as shown by the files and records in this cause. Further, in opposition to Motion for Summary Judgment herein Deponent states to this Honorable Court as follows:

1. That the Deponent has made an inquiry in person at the offices of the Michigan Public Service Commission in Lansing, Michigan with respect to the question of whether or not there have ever been any hearings conducted at the Michigan Public Service Commission specifically concerning the light bulb program operated by the Detroit Edison Company described in the Complaint herein. These inquiries were made on October 18, 1973 and again on October 25, 1973.

2. In addition Deponent has participated in this proceeding, preparing the Interrogatories that have been filed, examining the Answers to Interrogatories that have been filed, examining the documents that have been furnished by the Defendant herein in further response to the Interrogatories and has participated in discovery conferences with Plaintiff's attorneys. Deponent has participated in all depositions that have been taken in this matter with respect to the Motion for Summary Judgment.

3. Based upon examination of the files and records exhibited to him by personnel of the Michigan Public Service Commission, including Mr. Frank E. Van Camp in the regulation section and Mr. Edwin Carlson in the accounting department at the Michigan Public Service Commission, and based on the discovery herein, Deponent states upon his information and belief that there have never been any proceedings before the Michigan Public Service Commission or its predecessors specifically concerning the light bulb program of the Detroit Edison Company (of which there is any record) in which any testimony, exhibits, findings of fact or conclusions of law were considered or determined with respect to the issue of whether or not any need exists for the Detroit Edison light bulb program. Similarly on the same investigation and discovery it is Deponent's information and belief that there are no proceedings in which documents have been filed with or considered by the Michigan Public Service Commission, or any of its predecessors concerning the question of whether Detroit Edison should be treated differently as an electric utility from any other electric utility in the State of Michigan with respect

to whether or not they should have or maintain an electric light bulb program.

4. Further, as a result of these investigations at the Michigan Public Service Commission and participation in discovery in this matter, Deponent, upon his information and belief states that the only electric utilities in the State of Michigan which have an electric light bulb program (whereby a charge for the bulbs is made in the rates, and bulbs may be picked up without any further charge at offices of the utility) consist of the Detroit Edison Company, the Lansing municipally owned electric utility, and Consumers Powers Co. in the city of Pontiac only. Deponent on information and belief states that at one time the city of Grand Rapids had a program similar to that of the Detroit Edison Company but believes that said program in Grand Rapids has now been discontinued and that the electric utility in the city of Grand Rapids (Consumers Power Company) distributes bulbs at a discounted price to its electric users.

5. In the investigation conducted by the Deponent at the Michigan Public Service Commission in Lansing Deponent attempted to determine if there were any hearings at all where testimony or evidence was taken at either the Michigan Public Service Commission, or any of its predecessors, concerning any change in the rate sheets of the Detroit Edison Company with respect to the description of the light bulb program therein contained. The only matters that have come to Deponent's attention or knowledge as a result of this investigation and as a result of the discovery conducted in this cause are the following matters:

A. That rate sheets are on file at the Commission (see group Exhibit 1 to Plaintiff's Memorandum).

B. That Exhibit 9 to Plaintiff's Memorandum, a spread sheet, was given to the MPSC in 1972 having on it two line items of bulb program expense.

C. That the MPSC periodically audits Edison's books and records in Detroit as to all of its receipts and expenses.

D. That in an order of the Commission in Case No. U-1791 (Answer to Interrogatory 16) the lamp renewal program was referred to in a rate case where Edison asked to reduce its rates.

6. That in addition Deponent has discussed this matter with Mr. Edwin Carlson of the accounting or audit section of the Michigan Public Service Commission in Lansing, Michigan for the purpose of ascertaining what schedules of accounting data or other financial figures have ever been submitted to the rate department of the Michigan Public Service Commission in Lansing showing the complete cost, as segregated from other expenses of the Detroit Edison Company, pertaining to the light bulb program. Based upon this investigation Deponent is informed and believes the fact to be that no separate, segregated schedule of all of the light bulb expenses that have been and are being incurred by Detroit Edison in regard to the lamp exchange program have been filed with or prepared by the Michigan Public Service Commission, except the one document that developed in discovery in this cause which is known as Exhibit 9 and identified in the deposition of Mr. Daniels as being Exhibit 3. Deponent believes and upon his information and belief states the fact to be that the reference to cost of the lamp exchange program set out in Exhibit 9 does not include any charges of costs incurred with respect to the ownership or maintenance of the buildings and offices from which the Detroit Edison Company disburses bulbs and that said Exhibit does not include any allocated expenses for real estate taxes, fire insurance, maintenance of the buildings, utility expense of the buildings or other expense related to the physical plant of the exchange centers.

7. Further as a result of the stated investigation at the Michigan Public Service Commission and participation in discovery herein, Deponent on information and belief states that the Michigan Public Service Commission, and its predecessors, has never issued to Detroit Edison Company a franchise, license, certificate of authority, certificate of public convenience and necessity, or any similar document

setting out or describing the right or privilege of Detroit Edison Company to deliver electricity in any particular geographic area within the State of Michigan, and that no such certificate or authority has been issued by the MPSC or its predecessors with respect to the scope of the power of Detroit Edison Company to furnish electric power in its geographic area.

(s) David L. Nelson

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AFFIDAVIT OF JACK E. MENIG IN SUPPORT OF DEFENDANT'S MOTION FOR A SUMMARY JUDGMENT

(Filed March 25, 1974)

STATE OF MICHIGAN
ss.
COUNTY OF WAYNE

I, JACK E. MENIG, being first duly sworn, depose and say as follows:

1. THAT I am the Franchise Coordinator of the Civic and Community Affairs Department of the Detroit Edison Company.

2. THAT I have been employed by The Detroit Edison Company since 1935, and for the past 29 years, I have spent my time exclusively on franchise matters and franchise renewals.

3. THAT my duties as Franchise Coordinator involves the renewing of franchises in all townships, villages and cities within The Detroit Edison Company service area according to Public Act 106 of the Public Acts of 1909, as amended, and Article 7, Section 29 of the Michigan State Constitution of 1963.

4. THAT these duties entail meetings with the local legislative bodies in order to inform them of the franchise

necessities both in terms of the election law and the duration of the current existing franchise.

5. THAT additionally, my duties include an examination of the confirmation of the votes of the electorate for each franchise election, as well as the monitoring of all franchises.

6. THAT in said meetings with local legislative bodies, I have provided information regarding the service to be provided by The Detroit Edison Company, and have answered questions regarding, the rates, charges and conditions of service by indicating that these matters are under the authority of the Michigan Public Service Commission.

7. THAT I am well familiar with and have reviewed the contents of all currently existing Detroit Edison Company franchises.

8. THAT there are three different types of franchises currently existing for The Detroit Edison Company within its service area, that is, a perpetual franchise, a franchise for the life of the grantee and a franchise for either twenty or thirty year durations in order to comply with city charters.

9. THAT with respect to the rates, charges and conditions of service, the various franchises have since 1950 contained uniform language which is as follows:

> "Sec. 3. In consideration of the granting of this franchise, Grantee agrees that its rates and charges for electric service in the ..... of ..... shall not exceed its rates and charges for like service elsewhere in its service area, evidenced by its uniform rate schedules at the time on file with and approved by the Michigan Public Service Commission."

10. THAT in addition to this language, franchises enacted since 1961 contain the following additional language:

> "It is understood that the grantee is subject to regulation by the Michigan Public Service Commission, and that any order, rule or regulation by that Commission, or its successor, will prevail over any regulation herein contained or provided for in case of conflict."

11. THAT some franchises secured or renewed prior to 1950 contained a provision which required rates and charges to be the same as those in effect within the City of Detroit, but that all rates, charges and conditions of service within the City of Detroit are now and have since 1913 been duly authorized by the Michigan Public Service Commission.

12. THAT no provisions as to rates, charges and conditions of service exist in any current franchise other than as stated above.

13. THAT all rates, charges or conditions of service in all areas where a franchise is in effect or has been in effect since 1913 are only those rates, charges and conditions of service which have been duly authorized by the Michigan Public Service Commission.

Further, Deponent sayeth not.

(s) Jack E. Menig (L. S.)

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ORDER SETTING TIME FOR ORAL ARGUMENT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the Federal Building in the City of Detroit, County of Wayne, State of Michigan this 27th day of March, 1974.

PRESENT: The Honorable John Feikens, District Court Judge.

The parties having stipulated for approval of this Order Setting Time For Oral Argument of Plaintiff's Motion For Summary Judgment, now then upon the joint motion of the parties hereto;

IT IS HEREBY ORDERED that Oral Argument on Plaintiff's Motion For Summary Judgment will be heard on April 22, 1974 at 2 o'clock in the afternoon.

(s) John Feikens
District Court Judge

Approved for entry:

(s) Christopher C. Nern
Attorney for Defendant
Detroit Edison Company — Legal Department
2000 Second Avenue — 688 WCB
Detroit, Michigan 48226

(s) David L. Nelson
Attorney for Plaintiffs
Sommers, Schwartz, Silver, Schwartz,
Tyler & Gordon, P.C.
1800 Travelers Tower
26555 Evergreen Road
Southfield, Michigan 48076

MEMORANDUM OPINION
(Filed July 3, 1974)

Plaintiff, the owner of a drug store, sells electric light bulbs and brings this antitrust case charging that the defendant utility company has damaged him in his business.[1] The defendant, The Detroit Edison Company, supplies residential subscribers with electric light bulbs for such homes. Plaintiff claims that this anticompetitive practice injures him since he must sell his light bulbs while defendant replaces these bulbs without charge when they burn out, and thus he contends defendant has violated both the Sherman and the Clayton Acts (more specifically, Section 2 of the

[1] The Complaint purports to be a class action suit, but no class has been certified.

Sherman Act, 15 U.S.C. § 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14). Defendant has moved for summary judgment contending that it is shielded from liability under these federal statutes in that the utility is completely regulated by the Michigan Public Service Commission — that this involvement by the Commission in its business affairs constitutes "state action." It claims arguendo that it is not in violation of these statutes but that if it is in fact in violation, it is shielded from liability.

Plaintiff contends that defendant instituted the free light bulb plan for the sole purpose of increasing electrical consumption, a purely private motive, and that at best the Michigan Public Service Commission has rubber-stamped this plan. He adds that the Michigan Public Service Commission receives only sketchy data from defendant regarding this plan, that the Commission has never conducted open hearings on the light bulb program and that it does not regulate any of the administrative details of the program, such as bulb life and wattage.

Defendant argues that Michigan law gives the Commission plenary power to regulate utility companies. M.C.L.A. 460.6 provides:

> "It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities."

Defendant says that the Commission issued its order U-3910, dated August 19, 1972, under the authority conferred upon it by this statute and that the order made "lamp supply" a mandatory service under the approved rate structure. Defendant contends that it cannot abandon that service unilaterally and that it must obtain a superseding ruling if it wished so to do. In support of this observation it cites its bulb program for commercial subscribers. Here, before issuing order U-1791 in 1964 giving to the defendant the right to discontinue this specific program, the Commission required the defendant to supply it with substantial

financial information including data on the direct costs of that plan.

Thus the question which must be decided in order to determine whether summary judgment lies is whether the defendant's light bulb program can be characterized as state activity or private activity. If this light bulb program is in law state activity, summary judgment in favor of the defendant would be appropriate since in such instances the utility would be shielded from claimed antitrust violations.

In the lead case, *Parker* v. *Brown,* 317 U.S. 341 (1942), the United States Supreme Court held that a cooperative price fixing agreement among California raisin growers did not violate federal anti-trust laws if the agreement "derived its authority and its efficacy from the legislative command of the state and was not intended to become effective without that command." 317 U.S. at 350. Cases interpreting *Parker* in the context of utility regulation have generally reached the same result. When a state agency acts affirmatively in approving rates and practices of a utility, there is no antitrust liability.

> "Our view is that the *Parker* exclusion applies to the *rates and practices* of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority." *Gas Light* v. *Georgia Power,* 440 F.2d 1135 (5th Cir. 1971) (emphasis supplied).

This rate structure theory has been succinctly stated:

> "If its actions were occasioned by adherence to the rules and regulations of its operative tariff, then it is shielded from liability for any possible antitrust violation." *Business Aides* v. *Chesapeake Telephone,* 480 F.2d 754 (4th Cir. 1973) at 756.

See also *Allstate* v. *Lanier,* 361 F.2d 870 (4th Cir. 1966); *Marnell* v. *United Parcel,* 260 F. Supp. 391 (N.D. Cal. 1966).

Applying these principles to the case at bar, it appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.

It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the "rates," "services" and "operation of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the "service rendered" in proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine.

Plaintiff also contends that a state must consider the effects of a regulated practice on competition before enacting it. To this effect he cites two categories of cases: those involving large corporate mergers [*International Telephone* v. *General Telephone,* 351 F. Supp. 1153 (D. Hawaii 1972) and *U.S.* v. *Pacific Southwest Airlines,* 358 F. Supp. 1224 (C.D. Cal. 1973)], and those involving either fraud or collusive bidding [*Woods Exploration* v. *Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) and *Whitten* v. *Paddock Pools,* 424 F.2d 25 (1st Cir. 1970)].

The case at bar is clearly distinguishable. Despite plaintiff's allegation that defendant is "hiding" the true costs of the bulb program, this court can find no fraud of the type involved in *Woods.* Nor is this a case involving bidding of any type. The telephone and airline cases cited by plaintiff involve situations where one regulated enterprise is attempting to expand by buying or merging with another. In those cases it was necessary to evaluate the effect on competition of the proposed change. That was the central issue.

Here, defendant has already obtained a franchise to do business in every municipality in which it operates, and M.C.L.A. 460.502 *et seq.* provides that any utility seeking to introduce new services or facilities in an area already served must first obtain a certificate of public convenience and necessity. The court agrees with plaintiff that a state should consider the effects on competition of facilities such as these. But it is the effect of the entire project which must be examined, and this is done in proceedings involving franchises and certificates of convenience. Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition. And certainly the court should not step in when the Commission has not even been approached by plaintiff.

Defendant's motion for summary judgment is hereby granted.

An appropriate order may be submitted.

(s) John Feikens
United States District Judge

Dated: Detroit, Michigan
July 2, 1974

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court held in the Federal Building, City of Detroit, State of Michigan, this 21st day of August, 1974.

PRESENT: The Honorable John Feikens, District Judge.

This matter having come on for hearing upon Motion of Defendant Detroit Edison Company for Summary Judgment; the parties having stipulated that such Motion be initially limited to the "state action exemption" issue; the parties having filed affidavits, depositions, exhibits and briefs on such issue and the Court having heard oral argument thereon; the Court being fully advised in the premises and having rendered a written opinion on July 2, 1974; in accordance therewith:

IT IS ORDERED AND ADJUDGED, that the Defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED, and that judgment be, and the same hereby is, ENTERED in favor of the above-named Defendant.

(s) John Feikens
District Court Judge

Approved for Entry:

(s) David L. Nelson
Attorney for Plaintiff

(s) Thomas P. Bingman, Jr.
Attorney for Defendant

NOTICE OF APPEAL TO THE SIXTH CIRCUIT COURT OF APPEALS FROM THE ORDER OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed August 29, 1974)

Notice is hereby given that LAWRENCE CANTOR, d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated, Plaintiffs herein, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment and Order of the District Court designated, "Order Granting Defendant's Motion for Summary Judgment" which Order is dated August 21, 1974 and was entered on August 22, 1974.

Dated at Southfield, Michigan this 29th day of August, 1974.

By: (s) David L. Nelson
Attorneys for Plaintiff

Fohrman, Lurie, Holstein, Sklar
& Cottle, Ltd.

Boehm and Weinstein

ORDER
(Filed April 23, 1975)

BEFORE: PECK, McCREE and LIVELY, Circuit Judges.

The appeal from summary judgment for appellee in an anti-trust action alleging that appellant, who sells incandescent light bulbs at retail, has been injured by Detroit Edison's practice of furnishing to residential customers light bulbs as well as electric energy for a single monthly rate having come on to be heard on the record on appeal and upon the briefs and oral argument of counsel;

And it appearing that in the posture of the case submitted on motion there was no genuine issue as to any material fact and that a question of law was properly before the district court for determination;

And it appearing that the district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v *Brown,* 317 U.S. 341 (1943);

Upon consideration, it is ORDERED that the judgment be, and it hereby is, AFFIRMED for the reasons stated in the memorandum opinion of the district court filed July 3, 1974.

Entered by order of the court

(s) John P. Hehman
Clerk

EXCERPTS FROM TRANSCRIPTS OF DEPOSITIONS

Deposition of Lawrence Cantor

• • •

(4)

LAWRENCE CANTOR, having been first duly sworn by the Notary Public, was examined and testified as follows:

CROSS EXAMINATION
By Mr. Cohen:

Q. May I have your full name, please?
A. Lawrence Cantor. No middle name.
Q. What is your home address, Mr. Cantor?
A. 29312 Summerwood, Farmington.
Q. You operate a business?
A. Yes, sir.
Q. What is the name of the business?
A. Selden Drug. That is spelled S-e-l-d-e-n.
Q. What is the nature of it? Sole proprietor, corporation?
A. Sole proprietor.
Q. Are you the sole proprietor?
A. Yes.
Q. Are you the only one that has any interest in Selden?
A. Yes, I am.
Q. How long have you operated Selden Drug Company?
A. Since December 18, 1961.

(5)

Q. Where is it located?
A. At 3900 Second Avenue.

Q. What is the nature of the business?
A. General merchandise and prescriptions.
Q. This is at a retail level?
A. Yes, sir, retail.
Q. Approximately what was your net profit last year? By "last year" I mean the last fiscal year in which you operated.
A. You are asking me what I paid income tax on?
Q. Just what your net is. I am not going to inquire into your income tax —
A. (Interposing): O.K. I don't know what "net" means.
Q. What profit did you make on the store in 1972?
A. The profit that my accountant tells me includes my salary, and he doesn't differentiate between salary and what the net for the store was. It's all one chunk and that's what I pay my income tax on.
Q. What was that amount?
A. Is that for publication?
Q. For the purposes of the deposition, yes.
MR. HOLSTEIN: It's all right.
A. O.K. I don't know exactly. I think it was about $65,000, something like that.
Q. (By Mr. Cohen, continuing): What were your gross sales in your (6) last fiscal year, approximately?
A. Over 300,000.
Q. Now, what were your gross sales for light bulbs during this same period of time?
A. I don't ring them up on a separate department because I have so many different commodities, but it should be self-explanatory by how many I bought.
Q. Let me show you a piece of paper here that apparently is in response to our notice, which has invoice dates running from 7/22/71 to 6/7/73.
A. Which was the last time; 6/7/73 was the last time I purchased light bulbs.
Q. Which has on it the invoice date, size of bulb, unit cost, quantity, and wholesale cost. Now, are these all of the light bulbs that you purchased since 7/22/71?
A. Yes, sir, to the best of my knowledge.

Q. Now, that wholesale cost comes to — is totaled here at $90.88; is that correct?
A. Yes, sir.
MR. HOLSTEIN: May I suggest for the record that we mark that as an exhibit so we know what we are referring to.
(A handwritten itemization of light bulb purchases was thereupon marked Deposition Exhibit 1 for (7) identification by the reporter.)
Q. (By Mr. Cohen, continuing): Now, let me show you Deposition Exhibit 1. Was that prepared by yourself?
A. No, not totally. It was an employee, a former employee of mine who has worked for me for about eight years, and I didn't have time to summarize it so I asked her to summarize it, and she went over the invoices and picked them up.
Q. The figures on there of your knowledge are correct?
A. Yes. They look realistic.
Q. Am I to understand that these are all the light bulbs that you — and by "you" I mean as a drug store, the Plaintiff in this suit — have purchased since 7/22/71 for resale in your store? Is that correct?
A. Virtually. Some could have sneaked in from another supplier, but it would be minimal. If there are any — These are incandescent bulbs. Now, I also buy neon tubes for store use. These are all for resale.
MR. HOLSTEIN: Just answer the question. Just confine yourself to that.
Q. (By Mr. Cohen, continuing): Do you know of any other purchases for resale other than those listed in Deposition Exhibit 1 since 7/22/71?
MR. NELSON: Of what?
MR. COHEN: Of light bulbs.

(8)

A. Would you repeat the question?
Q. (By Mr. Cohen, continuing): Do you know of any other purchases of light bulbs by yourself for resale other than those listed in Deposition Exhibit 1 since 7/22/71?
A. No.

Q. Now, from whom were these bulbs purchased?
A. National Wholesale Drug.
Q. What is the make of the bulbs?
A. They are mixed. Sometimes they are Sylvania and sometimes they are G.E.
Q. Do you designate to your wholesaler which manufacturer's bulbs you desire?
A. Not usually.
Q. Do you do it at any time?
A. On the incandescent bulbs —
Q. (Interposing): Yes.
A. No.
Q. In other words, when you place an order, you just tell your wholesaler you want so many bulbs of a certain size, is that correct?
A. Yes.
Q. And he supplies you with those bulbs?
A. That's right.
Q. Do you have any agreements with your wholesalers, any written (9) agreements regarding bulbs?
A. No.
Q. Do you have any written agreements with either Sylvania or General Electric regarding bulbs?
A. No.
Q. Do you receive the bulbs on a consignment basis or do you purchase the bulbs?
A. Purchase.
Q. And how are the bulbs priced?
A. They are usually premarked with a suggested retail.
Q. What do you mean? Premarked how?
A. They are stamped with some kind of ink on the bulb itself. For example, 35¢ and a circle.
Q. Are they stamped sometime prior in point of time to the time you receive them?
A. Yes.
Q. You don't stamp anything on the bulbs yourself?
A. No.
Q. And when you sell the bulbs, do you have a section of your store in which they are kept, a specific area for the bulbs?

A. Yes, I do.
Q. And does the area in which they are placed have prices of any kind, point of purchase prices?
A. No.

(10)

Q. The only prices are on the actual bulbs themselves?
A. Yes.
Q. Now, have all the bulbs that you have sold since 7/22/71 as identified in Deposition Exhibit 1 been sold at the prices stamped on the bulbs?
A. Yes.
Q. Is there any reason why you don't sell at a different price?
A. I never thought of it.
Q. Did you ever have any discussions with your distributor regarding the prices of the light lamps, light bulbs?
A. There was never any reason to.
Q. When did you first start purchasing bulbs from National Wholesale Drug?
A. Since I started in business.
Q. You have been selling the bulbs since 1961?
A. Yes. I didn't purchase them exclusively from them.
Q. Have you ever purchased them directly from the manufacturer?
A. Never.
Q. Have you ever had any discussion with anyone at National Wholesale Drug in regard to the price at which you sell your bulbs?
A. No. Excuse me. What would you be referring to?
Q. The price of lamps. By "lamps" I mean light bulbs.
A. I don't know.

(11)

Q. Have you ever had your light bulbs on sale?
A. No.
Q. Have you ever had any other items in your store on sale?
A. Yes.
Q. Now, is there any particular reason why you have had other items and not had lamp bulbs on sale?

A. Yes. I have so few calls for them.
Q. That is the primary reason?
A. Yes. The only thing — the only time you put something on sale is to entice the customer, and what kind of enticement would it be if I cut the price on them?
Q. That is my question to you.
A. I never considered it any kind of enticement because I get so few requests for them.
Q. Has your light bulb business, to the best of your recollection, decreased or increased since 1961 when you first started selling bulbs?
A. It stays about the same.
Q. Has it stayed about the same since 1961?
A. Yes.
Q. Now, you are bringing this action, as I understand your complaint, on the basis of yourself and as a representative of a class of persons and business entities similarly engaged to yourself who are engaging in the business of selling light bulbs — (12) I am reading from your complaint now, paragraph 9 — "at retail in competition with the Defendant Detroit Edison in Edison's marketing area." Is that correct?
A. Yes.

• • •

(14)

Q. Why do you sell them at all?
A. Why do I sell them? There are requests for them. Everybody doesn't get them for free. Most people say, "Well, I get them for free." But everybody — like people come in, I try to notice who buys them or when they buy them. Sometimes somebody (15) comes in late at night, and I assume wherever they get them ordinarily, the source wasn't open; they can't go get it. And I have a lot of transients in my store who come in from down South and they buy a bulb occasionally, and so I do get occasional requests for them.
(There was a brief interruption.)
Q. (By Mr. Cohen, continuing): Now, is there any particular reason that you stock bulbs only in 75, 100, 150, 60 and 25 watts?

MR. HOLSTEIN: Just a minute. There was another question pending that he has not completed.
MR. COHEN: I am sorry. What was the previous question?
(The previous question and answer were thereupon read by the reporter.)
Q. (By Mr. Cohen, continuing): Do you want to continue that answer?
A. Yes. Mainly I don't want to disappoint good customers, and, secondly, it's nice to sell bulbs because there is a pretty good markup on it and I always hope that something will materialize with it.
Q. The markup is what?
A. It isn't a markup, actually. It's a profit, a profit margin of 33-⅓, which today is gratifying.
Q. You sell watches?

(16)

A. Yes.
Q. Timexes?
A. Yes.
Q. What is your markup on Timexes?
A. 33-⅓.
Q. You sell drugs?
A. Yes.
Q. What is your average markup on drugs?
A. How do you classify drugs?
Q. Prescription drugs.
A. I don't know what it is because we are on a fee system, not a markup system. There is a profit, but I have never figured it as a markup percentage. I can't.
Q. You sell over-the-counter drugs?
A. Yes.
Q. What is your average markup on —
A. (Interposing): In that neighborhood. I don't know if it is — I have never done a — I know what it is. A ballpark figure is 32, 30 percent to 33-⅓, unless you discount them.
Q. Do you have any substantial sales of items over 30 percent markup or margin?

A. No. That is the best I can hope for. That is a good one. That is worth shooting for.

Q. If you sold $90 worth of bulbs in approximately two years — (17) I am sorry — the wholesale cost was $90 — with a one-third markup, you would have made $30 on those bulbs, is that correct?

A. Forty-five, hopefully.

Q. Forty-five. Which figures out to about $15 a year.

A. Yes. That's why I was concerned. I am not selling any and there is a good markup on it and why can't I do something with this?

Q. When did you first become concerned?

A. Oh, a couple years ago. I started thinking about it. I met a friend who was in the lighting business.

Q. Who was your friend in the lighting business?

A. He is from Chicago and his name was Ronald Stone.

Q. What is the name of his business?

A. I think it is called Lightning Bug, Incorporated.

Q. Is he still in the business?

A. Yes, he is.

Q. And what discussion did you have with him that got you thinking about this?

A. He asked me if — he wanted to sell me some bulbs. He said, "Do you sell a lot of bulbs?" And I said, "No, I don't really sell any because there is something going on in Michigan where people don't buy bulbs from me. I have heard that people get them free, so-called, from Edison, so why should they pay any money for them?"

• • •

(19)

Q. Based on your conversation at the druggists' conventions and with your friends in the business, do you know of any retailers that sell bulbs other than at the price which is stamped on the bulbs?

(20)

A. Amongst my friends, I don't.

Q. Well, apparently, from the complaint, you are blaming your lack of sales of the bulbs on certain practices of Detroit Edison; is that correct?

A. Yes, sir.

Q. My only question to you is how do you know that your lack of sale of the bulbs is not caused by other retailers in your area selling bulbs at less than you do?

A. Well, in the past — the situation is changing, but in the past I was open hours when most other folks weren't, and in those late hours I didn't sell many bulbs then, either, and I was, like, the only one open.

Q. What time were those late hours?

A. 10:30 at night.

Q. To what time?

A. Oh, my hours were from 9:30 a.m. to 10:30 p.m.

Q. What time did the other retailers generally close?

A. Six, seven.

Q. So —

MR. HOLSTEIN (Interposing): I am going to object to the question. It has not been established here that the other retailers are selling any more bulbs than he does and in terms of the complaint —

• • •

(25)

Q. How long have you been aware of their bulb exchange program?

A. I don't know when I was first aware of it, but it seems like a long time, because my wife takes her bag and goes and gets bulbs and changes the bulbs. Probably when I first got married I went out to buy a bulb and she said, "What are you doing that for? We can get them free."

Q. Your wife made you aware of that practice, did she?

A. Yes. She said they were free.

Q. And you have availed yourself of that?

A. My wife did.

Q. Still does?

A. Yes, I think so.

Q. Do you know the kind of bulbs that are available under the Detroit Edison exchange program?

A. I know the kind of bulbs she has for exchange in a

bag at home, and they are incandescent bulbs. They are 100 watt, 150 watt. That is usually what I see in there. I guess there is some 75's or 60's, some 3-way bulbs.

Q. Have you ever personally made any effort to determine what kind of bulbs — by "kind" I mean the wattage — what wattage bulbs are available in the Detroit Edison program?

A. No. But I just knew the kind that were in her bag and she got those all there, so I know that those bulbs are supplied by Edison. Those were all there was.

(26)

Q. Pardon me?

A. I never wanted anything exotic so I never inquired.

Q. What complaints, if any, has your wife given to you or made known to you in regard to the Detroit Edison exchange program?

MR. HOLSTEIN: I am going to object. That is a privileged communication and it is irrelevant and immaterial.

MR. COHEN: It is privileged in some regard. I don't think it is privileged in this regard.

MR. HOLSTEIN: I will instruct him not to answer that.

A. Pardon?

Q. (By Mr. Cohen, continuing): He has instructed you not to answer the question. What complaints do you have in regard to the service?

MR. HOLSTEIN: Again, I object. Irrelevancy and immateriality. The question is not —

MR. COHEN (Interposing): I haven't even finished the question yet.

MR. HOLSTEIN: You said "the service." I assume you are saying "light bulb service." I am sorry. Complete your question.

Q. (By Mr. Cohen, continuing): Prior to the time you started this lawsuit, what complaints, if any, had you had from any source (27) in regard to the practices of Detroit Edison in furnishing light bulbs under their exchange program?

MR. HOLSTEIN: I object unless you qualify the question. Are you talking about retailers?

MR. COHEN: From any source.

MR. HOLSTEIN: Well, if you are talking about retailers, I think he has already answered that, and if you are talking about consumers, then I think that that is irrelevant and immaterial.

MR. COHEN: The motive for his lawsuit is not irrelevant and immaterial when you are talking about a class action case, and that is the purpose of the question.

MR. HOLSTEIN: I think he has answered as to the motive. He wants to increase his share of the market.

MR. COHEN: This is discovery. I have a right to ask the man questions in regard to anything that is relevant or could lead to information that could be relevant at the time of trial.

Q. (By Mr. Cohen, continuing): My question to you is if you had any complaints prior to the time you started your lawsuit from anybody regarding the Detroit Edison light bulb exchange program?

MR. HOLSTEIN: Again, I instruct him as to retailers, he has already answered that, and I object to the (28) question with regard to consumers, but he can answer it over my objection.

A. I just have my own complaint.

Q. (By Mr. Cohen, continuing): That is not my question. The question is, do you have complaints from any other source?

A. No.

Q. And that includes any of your customers to whom you spoke?

A. No complaints.

Q. I think you testified that you personally did not have knowledge of who the other members of the class are except people that sell light bulbs; is that correct?

A. I would assume there is a lot of those. There is no —

MR. HOLSTEIN (Interposing): That's all right. Don't — you have answered the question.

MR. COHEN: I didn't hear his answer.

Q. (By Mr. Cohen, continuing): What did you say?
A. Would you repeat the question?
MR. COHEN: No. Would you read the question back to him, please?
MR. HOLSTEIN: Read the question and the answer.
(The record was thereupon read by the reporter.)
Q. (By Mr. Cohen, continuing): Is that your full answer?

(29)

A. There's a lot of retailers that sell light bulbs.

• • •

(30)

Q. Well, we'll give you a chance to say what you want to say here. In paragraph nine you state that you bring this suit on behalf — and I am skipping two lines here — "of persons who are engaged in the business of selling light bulbs at retail in competition with the Defendant, Detroit Edison Company." To the best of your knowledge, does Detroit Edison sell light bulbs at retail?
A. No. I don't know that. I don't even know what that question meant, do they sell at retail. In light of what I — when I found out that they are putting a charge on, and it looks like it's hidden because it's never said, "This charge is for light bulbs whether you get them or not," then I don't know if they are charging me retail or not.
Q. Let me go back because you say you don't understand this. Did you read this complaint before it was filed?
A. Yes.
Q. Let me read your own language back to you again.
A. O.K.
Q. "9. Plaintiff brings this action on his own behalf and as representative of a class of persons and business entities similarly situated to the named Plaintiff who are engaged in the business of selling light bulbs at retail in competition with the Defendant Detroit Edison Company in Edison's marketing area."
A. Yes.
Q. Do you understand that paragraph?

(31)

A. Yes.
Q. My question to you is to the best of your knowledge does Detroit Edison Company sell light bulbs at retail in competition with you?
MR. HOLSTEIN: I object that he has already answered that question. You asked him that before.
MR. COHEN: The answer is no?
MR. HOLSTEIN: No, he said that they sell bulbs by virtue of the fact that — I think the question and answer speak for themselves.
MR. NELSON: I will add to the objection the fact that it calls for a legal conclusion.
MR. COHEN: Well, do you want to read back when I asked him the question previously? Then he answered it and then he went on to say that he didn't understand what I asked him. I am just trying to give the witness a chance to clarify it if he wanted to clarify it.
(The record was thereupon read by the reporter as follows:
"Q. Well, we'll give you a chance to say what you want to say here. In paragraph nine you state that you bring this suit on behalf — and I am skipping two lines here — 'of persons who are engaged in the business of selling light bulbs at retail in competition with the Defendant, Detroit (32) Edison Company.' To the best of your knowledge, does Detroit Edison sell light bulbs at retail?
"A. No. I don't know that. I don't even know what that question meant, do they sell at retail. In light of what I — when I found out that they are putting a charge on, and it looks like it's hidden because it's never said, "This charge is for light bulbs whether you get them or not," then I don't know if they are charging me retail or not.")
MR. HOLSTEIN: I think that answers your question, Mr. Cohen.
Q. (By Mr. Cohen, continuing): During the course of that answer you stated you didn't understand what I was saying. Then you gave a rather long answer. Do you understand what I was saying?

A. No. I wanted a definition from you. I wanted clarification.

Q. Clarification of what?

A. What do you mean when you use the phrase "sell at retail"? Obviously they are not doing — putting out bulbs with prices on them and selling them — and giving them to people in the conventional manner. However, if you are talking about how much profit they make, they might be making more than I make. I don't know what deal they made with their supplier. That's why I didn't know what you meant.

Q. How do you mean "at retail" in paragraph nine of your complaint?

A. You are saying that you set them in your store or you set them (33) in your place and people come in and request them, and I bought them and I sell for a third profit at the customer's request. Well, obviously, I know that Detroit Edison does not have a retail front of that sort. So I would say "no" to that question. But if you are alluding to the fact about their profits or what they do, they do better as far as I am concerned with their program than I am doing with mine profit-wise. That's why I didn't know which way to answer.

Q. Do you know how they are doing with their program profit-wise?

A. No, but if I were them, I am sure I could buy bulbs a lot cheaper than I buy them, so they must be doing better.

Q. My question is do you have any facts —

MR. HOLSTEIN (Interposing): He has answered your question.

MR. COHEN: No, he hasn't. He has given me his conclusion. I want to know whether he has any facts whatsoever in regard to what profit, if any, Detroit Edison makes from its light bulb program.

MR. NELSON: Are you distinguishing the profitability of the light bulb program, Mr. Cohen, from the profitability of the company generally?

MR. COHEN: Yes, from the light bulb program. He

just got through saying he was sure they made a profit selling light bulbs.

• • •

(37)

Q. A legal attempt to monopolize.

(38)

A. It sounds self-explanatory. A monopoly means to restrain others from operating in your area of business, and "legal" means that it be condoned by the powers that be.

Q. What does a legal monopolization mean to you in your own words?

A. It means that somebody has got something going for them and it's O.K. with the government or whoever decides.

Q. And does the phrase "tie-in sales" have any meaning to you?

A. Tie-in sales are when people — people might come into my store and ask for a light bulb and I might be able to sell other things to them, too, if they did come in and ask for a light bulb. "Do you have extension cords? Do you have enough plugs, outlets?" — various things that you might group together in a display if that was a big area of your mercantile practice.

Q. Do you do that in your store?

A. I try — yes, I do it in areas that are profitable, a reason for it.

Q. That is what "tie-in" means to you?

A. Yes.

MR. HOLSTEIN: Well, in this complaint, though, in regard to electric power and bulbs —

A. (Interposing): I don't think I answered that.

Q. (By Mr. Cohen, continuing): Is there something else you wanted to say?

(39)

A. No, I am not putting this into that paragraph. I am just defining these things like off the cuff.

MR. HOLSTEIN: I would like the record to show that these were words of art; that Mr. Cantor was advised by his counsel in describing the conduct of Detroit Edison, and these are words that were — phrases that were produced into the complaint as a result of legal counselor's advice and were not words that were produced or given to Mr. — were given to Mr. Holstein or any other counsel of the Plaintiff by the Plaintiff.

Q. (By Mr. Cohen, continuing): Well, in your own words, Mr. Cantor, in filing this complaint, what practice or practices of Detroit Edison are you concerned about?

MR. HOLSTEIN: I object. The question has been, as in many other instances this afternoon, asked and answered.

Q. (By Mr. Cohen, continuing): Can you answer the question?

A. Shall I answer it?

MR. HOLSTEIN: Let's confer.

(Mr. Holstein conferred with co-counsel off the record.)

MR. HOLSTEIN: We are going to instruct the witness not to answer. The complaint speaks for itself, and on behalf of the witness I will stand on his complaint.

(40)

MR. COHEN: As long as you are instructing him not to answer, I have a right to ask a witness, particularly in a class action lawsuit, what his specific complaint is; what, in other words, he is complaining about, in his own language, aside from terms of art. I am just stating that for the record inasmuch as you have instructed him not to answer. It is a matter for the Court to determine.

Q. (By Mr. Cohen, continuing): Now, you said previously at least that one of your reasons for your case — strike that. One of your definitions of "attempts to monopolize" or "legal monopoly" is that the actions restrain others. You said you felt you were restrained by Detroit Edison's actions. Is that correct?

A. Yes.

Q. Now, in your own words, how are you restrained?

MR. HOLSTEIN: I object. Again, we will stand on our

complaint and the Plaintiff will stand on the answers previously given at this deposition. I instruct him —

MR. COHEN (Interposing): This man has testified in his own words that he felt the actions of Detroit Edison restrained him, and I have a right to know on the record what he means by his answer.

MR. HOLSTEIN: I object. I believe the witness has already testified in answer to your question that were Detroit Edison not acting as it does, as alleged in the (41) complaint, the witness feels that he would be able to sell more incandescent light bulbs and increase his profits in these areas.

MR. COHEN: I have asked the witness a question and you have made your answer, and you direct him not to answer it or you don't.

MR. HOLSTEIN: I think the question has been asked and answered previously in the deposition.

MR. COHEN: Are you directing him not to answer or not?

MR. HOLSTEIN: Yes.

MR. COHEN: You are directing him not to answer that last question of mine?

MR. HOLSTEIN: Yes.

Q. (By Mr. Cohen, continuing): Is it your understanding that a person who — strike that. Can your wife, who uses Detroit Edison's, exchanges her bulbs, as you stated, at Detroit Edison — do you know of any reason why she isn't free to buy her bulbs somewhere else if she so desires?

MR. HOLSTEIN: I object as to the relevancy and materiality of that question.

MR. COHEN: Are you directing him not to answer or not?

MR. HOLSTEIN: We will let him answer that (42) question.

A. You will let me answer?

MR. HOLSTEIN: Yes.

A. She thinks she is getting them free and I found out subsequently that she is not.

Q. (By Mr. Cohen, continuing): My question is, if she

wants to, can she get her bulbs somewhere besides Detroit Edison?

A. That is her privilege. Nobody is saying she can't. However, she doesn't want to because she thinks she is getting them free, so why should she spend money for bulbs someplace else when she gets them for what she thinks is free?

MR. COHEN: Read his answer back, please.

(The last answer was thereupon read by the reporter.)

Q. (By Mr. Cohen, continuing): Now, what did you find out subsequently that indicated that she was not getting them free?

A. I found out that there is a service charge, part of the charge for electric service includes some kind of charge for bulbs.

Q. How did you find that out?

A. From Mr. Holstein.

Q. Did you tell that to your wife?

A. Yes.

Q. Does she still think she is getting them free?

A. No. She hasn't gone lately to get any since I told her.

• • •

DEPOSITION EXHIBIT 1

INVOICE DATE	SIZE BULB	UNIT COST	QUANTITY	WHOLESALE COST
6- 7-73	75w	.213	24	5.12
6- 7-73	100w	.213	24	5.12
6- 7-73	150w	.326	12	3.92
2- 1-73	60w	.213	24	5.12
8-10-72	150w	.33	24	7.84
5- 4-72	150w	.33	24	7.84
5- 4-72	color 25w	.30	12	3.60

INVOICE DATE	SIZE BULB	UNIT COST	QUANTITY	WHOLESALE COST
4-27-72	150w	.33	24	7.84
4-13-72	100w	.22	24	5.28
3-25-72	150w	.30	24	7.20
2-12-72	60w	.20	24	4.80
11-04-71	75w	.20	24	4.80
9-25-71	100w	.22	24	5.28
8-28-71	3-way 150w	.53	12	6.32
7-22-71	color 25w	.30	12	3.60
7-22-71	150w	.30	24	7.20
				90.88

Annual purchases from this wholesaler are between 130-140M a year

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DEPOSITION EXHIBIT 2

BULB INVENTORY

WATT	HOW MANY
25	72
60	12
75	21
100	22
150	15
3 Way (50-100-150)	12
25 Watt Tubular Lamp	

Deposition of Robert J. Blok

• • •

(4)

ROBERT J. BLOK, called as a witness for cross-examination under the Federal Rules of Civil Procedure, being duly sworn by the Notary Public, was examined, and testified as follows:

• • •

CROSS EXAMINATION
By Mr. Nelson:

Q. Mr. Blok, would you please state your full name.
A. Robert J. Blok.
Q. And you are employed with the Detroit Edison?
A. Yes.
Q. Where do you reside, Mr. Blok?
A. In the Walker Cisler Building, Room 534.
MR. COHEN: Off the record.
(Discussion off the record.)
Q. (By Mr. Nelson): Your residence, Mr. Blok?

(5)

A. Dearborn, Michigan.
Q. Could we have a street address.
A. 24916 Winona.
Q. That is in Dearborn?
A. Yes.
Q. Your educational background is what, professionally?
A. I have a business administration degree in marketing.
Q. From what university?
A. Detroit Institute of Technology.

Q. You have been with Detroit Edison for how many years?
A. Thirty-three years.
Q. Your present classification or office is what?
A. I am supervisor of the materials and supplies buying division.

• • •

(33)

Q. Anything else on quality that you take into account?

(34)

A. Those are the items that we are concerned with.
Q. Does it, Detroit Edison, test these lamps?
A. No, not at present.
Q. Are the lamps tested by anybody?
A. Manufacturers do test lamps.
Q. That would be Westinghouse and the like?
A. Sylvania and General Electric.
Q. And do you get copies of their test reports?
A. We receive test reports every six months.
Q. What do they test?
A. They test the items that I have just related on average watts, watts at seventy per cent of life, lumens.
Q. How frequently is this done?
A. They are testing lamps continuously at their facility in Nela Park, in Cleveland.
Q. That is, General Electric, the address you just gave?
A. That is correct.
Q. Are any of the other, Sylvania, Westinghouse, do they test?
A. They do.
Q. How frequently are these tests made?
A. They test a certain number of lamps out of certain lots during an entire six month period, and it is a continuing program where they take certain lamps out of certain manufacturing and put them on the test rack and run them for (35) the number of hours they expect to get out of a lamp. Thirteen hundred and fifty hours could mean many, many months before that lamp burns out.

Q. Who in Detroit Edison gets those test reports?
A. I receive copies, and the marketing department.
Q. Anybody else?
A. Not that I know of.
Q. Do you have a copy of such a report with you?
A. I have a copy, yes. That is not the current report, but it is one that we do receive.
Q. Are there anywhere in the purchasing documents that, that you create, these various documents that you describe, are there anywhere in those documents any references to any of these testing requirements here, as far as the performance of the bulb is concerned?
MR. NERN: I would have to ask you to define performance.
Q. (By Mr. Nelson): Do any of the — or, strike it again.
Does any of the language of your bid requests or quotations, or the like, refer to these tests that you have handed me?
A. No.
Q. What need does your department have for the test information?
A. Well, it, the test information tells us that the lamp is (36) meeting what we expect in a lamp in the way of life and wattage output.
Q. Again, your specs do not, or your quotations do not refer to wattage or length of life?
A. Not to my knowledge.
Q. But that is a factor, though, is it not, that you take into account when you meet and analyze and determine quality?
A. Right.
Q. Do you send those test reports to anybody else other than the people that you have described?
A. I have referred these reports to our engineering research department for review.
Q. That would be Mister who?
A. Mr. Galloway.
Q. And what, for what purpose does he get these reports?

A. He is chairman of our lamp standardization committee, and at one time our research department did test these lamps.
Q. When did they cease doing that?
A. I believe it was about two years ago.
Q. And did they create reports during the period they tested?
A. I cannot answer. I do not know. I assume they probably did, but I do not find any in the file.

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(39)

Q. To your knowledge, dealing with the engineering tests of the lamps, is not filed with any public body, is that correct?
A. No, it is not.
Q. Are any documents of your department filed with any public body?
A. Not to my knowledge.
Q. It is not a regular part of your business activity as the manager of the division to file any kind of public report?
A. No.
Q. You do not have to, for instance, report to any public body with respect to the purchasing procedures that you described?
MR. NERN: Could you just indicate at this point that you are speaking directly of records of Mr. Blok and his division in terms of the reporting?
MR. NELSON: Absolutely. Absolutely.
Q. (By Mr. Nelson): Does your division file any kind of written report with any public body?
A. Not to my knowledge.
Q. And if your division did file such a report, which it was required to do so, surely you would have such knowledge?
A. I would.

(40)

Q. Do you receive from any public body or agency a

request for any kind of reporting information as a regular course of your activity?

A. Regarding lamps?

Q. Regarding lamps.

A. No.

Q. And, I take it, that those answers would surely include the Michigan Public Service Commission, is that correct?

A. I don't understand the relationship.

Q. You do not make any kind of a report; you do not get a kind of request for a report from the Michigan Public Service Commission?

A. Not to my knowledge.

Q. So they do not in any way supervise or regulate you, telling you what you ought to do, what you cannot do, in connection with the purchasing procedures that you described?

A. Not to my knowledge, in the purchasing area.

Q. So if you want a bulb with twenty-seven hundred lumens, or sixteen hundred lumens, or whatever you wish, you are not told in that connection what the lumen power of the bulb ought to be by anybody, is that correct?

A. You mean anybody outside of Detroit Edison?

Q. Yes.

A. No, we are not told.

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(56)

Q. But, I take it, again, that the, the presence of, or absence, or amount of any discount of that character, (57) is certainly something that is considered by the purchasing department in awarding the purchase order?

A. Well, the discount affects the unit cost, the net unit cost, and that is what we are interested in.

Q. You also told me that the Detroit Edison bulb that is used in the program is not, to your knowledge, available through anyone other than Edison, is that correct?

A. To my knowledge, yes.

Q. Do you know, of your own knowledge, why a particular manufacturer or supplier would state his prices as a

fixed price with a discount in the category of sixty per cent? Do you know why it is done that way?

A. No, I do not.

Q. Has this always been the case, that there have been these discounts from these manufacturers, since you have been with the department?

A. My observation of the bids, the bids are submitted oftentimes each year in a different manner. Some might quote a net price. Some might quote a discount in varying degrees. It depends on their given situation in a given manufacturing period.

Q. And I think we established this morning that your department does not file any information relative to discounts with any public body, is that correct?

(58)

A. Correct, we do not.

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(70)

CROSS EXAMINATION
By Mr. Sklar:

Q. Mr. Blok, do you have any independent knowledge as to whether any of the reports which your department generates, or any of the correspondence or documents which pass between Detroit Edison and these lamp suppliers from your department, are transmitted to any governmental agency?

A. Not to my knowledge.

Q. Okay. During the time that you have been employed by Detroit Edison, have you ever been called upon to testify in any proceeding with the Michigan Public Service Commission?

A. I have not.

Q. Do you have any knowledge as to whether any of the people working for you in the purchasing, in purchasing, who are connected with the light bulb exchange program, have ever testified before the Michigan Public Service Commission?

(71)

A. To my know edge, they have not.

Q. Do you have any independent knowledge as to why some of the suppliers of lamps for the light bulb exchange program choose to quote a higher price and a substantial discount, whereas others quote a lower net price to you?

A. I have no knowledge why they do that.

Q. Do you have any knowledge as to whether any of your lamp suppliers sell bulbs of a similar quality and kind in terms of life and lumens to others, other than Detroit Edison?

A. Could you restate that.

Q. Yes. Do you have any independent knowledge that any of your lamp suppliers that supply lamps for your light bulb exchange program sell to people other than Detroit Edison, lamps of a similar life and lumen output as those which are used in the Detroit Edison lamp exchange program?

A. I am not aware that they do.

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(72)

CROSS EXAMINATION
By Mr. Cohen:

Q. Mr. Blok, I just have a couple of questions on direct. Do you recall being asked a question as to, in regard to whether or not the information which you gathered in your purchasing was distributed to anyone else in the Edison organization for ultimate submission to a public body? Do you recall being asked that question?

A. Yes.

Q. And I believe your answer said it was not to your knowledge. Now, is that correct?

A. Correct.

Q. Now, is it my understanding that you do not directly direct any of this information to anyone other than your immediate supervisor, is that correct?

A. That is correct.

Q. Now, to your knowledge, is the information that you gather ultimately distributed to the accounting department in Detroit Edison?

A. It is.

Q. And, if you know, does the rate bureau get information from the accounting department to be used in submission to government bodies?

A. I would believe they would.

MR. COHEN: I have no further questions.

(73)

RE-CROSS EXAMINATION
By Mr. Sklar:

Q. Do you know which, or do you have a belief as to what information which is generated by the purchasing department with regard to the light bulb exchange program ultimately is presented in some fashion to any public body?

A. I understand that it is.

Q. Do you have any idea as to what kind of information of all the information which you generate is presented to a public body?

A. I do not, no.

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Deposition of Ronald Daniels

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(4)

RONALD DANIELS, called as a witness for cross-examination under the Federal Rules of Civil Procedure, being duly sworn by the Notary Public, was examined, and testified as follows:

MR. NELSON: The witness is sworn, and we will have

the same stipulation, which is to the effect the deposition is being taken by stipulation, notice is waived, and we understand that the Defendants have requested the privilege of reading and signing the deposition.

Is that correct?

MR. COHEN: I believe the word is "right", but certainly we have requested it.

CROSS EXAMINATION
By Mr. Nelson:

Q. Mr. Daniels, your full name, please.
A. Ronald Daniels.
Q. You reside where?
A. My residence?
Q. Yes.
A. 20967 East Farm, Northville, Michigan.

(5)

MR. NELSON: Off the record.

(Discussion off the record.)

Q. (By Mr. Nelson): You have been with the Edison Company for how long, sir?

A. I have been with Detroit Edison since July 2nd, 1961.
Q. '61?
A. Yes.
Q. And prior to that, where were you employed?
A. I was attending the University of Michigan.
Q. Did you graduate from the U of M?
A. Yes, I did.
Q. And with what degree?
A. I have a Bachelor's degree in electrical engineering, and a Bachelor's in mathematics.
Q. Did you receive any formal university instructions subsequent to the receipt of those degrees?
A. I have taken accounting courses and also the management course that the University of Michigan offers, which is approximately a one month course, including accounting, economics, personnel development, and a number of items which are included in management.

Q. What is your title with the company now, Mr. Daniels?
A. My present title is director of the rate and revenue requirement department.

(6)

Q. Is that located in this building, the Walker Cisler Building?
A. No; it is in the general offices, which is across the street.
Q. 2000 Second?
A. That is correct.
Q. Is that where all of the rate and requirement section is located?
A. Yes. My entire department is in that building.
Q. When you first came with Edison in 1961, in what capacity were you employed?
A. I was employed as a college graduate in training, which is a training arrangement that Detroit Edison has. It is to develop professional manpower personnel.
Q. You started in training, and how long were you in training?
A. The program is designed to last five years. It takes the individual into the program, assigns various types of projects and problems, and is designed to develop an individual to a point where at the end of five years he is ready to go into a "professional job". That is, have the level of responsibility to handle jobs on his own.

Now, it does not necessarily mean it will take five years; depending on any one person's abilities. He may complete that period in three years, or whatever.

(7)

I, in that period of time, I had a title of assistant engineer. Then after the five year period I became research engineer. And in approximately 1970 I became the assistant director of the rate department. Then in July of 1973 I became the director.

Q. How old are you now, Mr. Daniels?
A. I am thirty-four.

Q. So that your experience since the training program has, fundamentally, been in the rate department?

A. Yes, except for a six month period when I was on a cross training assignment to the plant accounting department, I have spent all of my time in the rate and revenue requirement area.

Q. What was the purpose of doing that cross programming into accounting?

A. The cross training is to better equip individuals, and plant accounting is an area that we request a fair amount of information from, and so the idea was to better acquaint me with some of the problems they have, and then also to introduce to them some of the needs that we had. So it is a, really, a communication type of thing. It provides more background for, for the individual being trained, and it provides more understanding.

Q. How many employees are there in the department, rate (8) department? I call it a rate department. I think you added another word to it.

A. Well, the department name is rate and revenue requirement. "Rate" is fine. I won't have any difficulty with that.

Q. How many employees are in that department, approximately?

A. Currently we have twenty-two employees in the group.

Q. Do any other departments have any function to perform in connection with rates other than your department?

A. The design and development of rates, you mean, or — because something you should understand is that the development of rates is really a cross section or a coming together of both the technical side of the company and the accounting or financial side of the company, because the, the design of rates have a, an effect, or have a resultant of how the system is operated. If we, if our engineer or production side of the company is doing something exactly contrary to a feature of the rates, then we will not get the results that are desired.

Q. So would it be fair to say your department, then,

would have liaison or some communication, basically, with all aspects of the company? Is that a safe statement?

A. We have a wide range of contact with other areas. I guess I would not characterize it as having liaison with all areas, but certainly we have a great deal of liaison with the (9) marketing, the engineer, the production, accounting, tax. So it covers a wide spectrum of the company.

Q. Is the rate department, then, something that is in the continuous state of existence? Does it function continuously?

A. To my knowledge, the rate department has been in continuous existence for — well, I guess probably the last twenty-five to thirty years as an independent entity.

Now, prior to that, the, that rate function was a part of, I believe it was the statistical department, but it was, it did exist as far as the, the design, development, administration of, of the rates.

Q. In any event, rates now have, from what you have indicated to me, the rate making function apparently has developed to the extent there is a continuing need for a department of twenty-two people who do nothing but work on rates, is that essentially correct?

A. The end result is rates. There is a great deal of study that goes into the design and development of rates. You have cost of service studies, you have load research studies, rate research into the particular type of rate or rate feature that is necessary, and there is, there is a great deal of background in development that must go into any rate or rate proposal.

Q. I would assume that one of the functions that your (10) department would perform would have to do with times when Edison is applying for a rate change, isn't that correct?

A. We are quite involved in any rate activity, yes.

Q. Other than that which would involve preparing documents or the like for the Public Service Commission, is that correct?

A. Yes. We have been very much involved in all of the rate cases that, that have occurred in recent years.

Q. What else does the department do other than that

function of preparing exhibits and data for submission in rate cases?

A. The department is composed of two specific groups with further breakdown. One, the rate division has rate administration, rate research and load research. Rate administration is the interpretation of particular features in rates, and also the handling of commission type complaints. The rate research is the design and development and analysis of a particular rate form or rate feature.

Load research is the study of how customers utilize the energy that they, they take, and also when they utilize that energy.

On the other side of the department, the revenue requirement section, we have cost of services, which is a, a development of the profitability of each particular class. It is the allocation and assignment of revenues, expenses and investment to the particular rate (11) classes.

We also determine the depreciation rates, and make any life studies and related studies to depreciation that are necessary, and secure from the Public Service Commission the necessary orders, for the company to be able to apply those rates.

In addition to that, we do economic studies such as comparison of buy versus lease, the things that would determine a least revenue requirement for a particular project.

Q. So as far as economic data that is submitted to the Michigan Public Service Commission is concerned, in a rate case, for instance, that would be the responsibility of your department, is that correct?

A. Well, I guess I am — when you say "economic data", that covers a real broad spectrum. I am not sure that I understand your question.

Q. Your quarrel with the question is the word "economic". If I change that to "internal accounting and statistical data", would your department be exclusively involved in the preparation of the internal —?

A. We would not necessarily be exclusively involved. The general accountant — well, let me back up a bit. As far as the testimony before the Public Service Commission, (12) it would be most likely that the general accountant

or someone in his area would testify to certain accounting adjustments, or the, the figures that are on our income statements. For instance, the, a member of the general accountant's department testified to the, the net income of the company for the test period in the last rate case.

Q. That net income, then, would not be something that would necessarily fall into the rate and revenue area of responsibility?

A. That is correct. It is part of the general accounts.

Q. It is in general accounting?

A. It is in general accounting.

Q. So in that framework, what kind of data does your department submit to the Michigan Public Service Commission in a rate case?

A. The department submits the, all of the revenue changes — well, adjustments to income statement such as the effect of fuel adjustment increases. The effect of rate increases from previous cases on that test period. The, in this case, I testified to the redispatch of our generating units to reflect an end of period test year. I testified to the rate base. Members of our department testified to the rate design, the effect of the, the proposed rates on customers as far as increases were concerned, and also the, the cost of (13) service. That is, the, those expenses that, expenses, revenues and investments that have been assigned to various classes of service.

Q. May I ask you this question — which is a question that I have about the rate making process — exactly what factors are taken into account, general factors, by Detroit Edison in determining a rate? What are you trying to do?

A. Our main objective in determining rates is to structure rates to be basically coincident with the cost of service. We perform cost of service studies and in our development of rates we attempt to follow those costs of service studies as closely as possible. There are instances where it is difficult to exactly meet cost of service, because the, the increases would be so substantial that there would be a definite dislocation to the, the customer. So our main objective has been to follow a cost of service approach.

Q. Would it be correct for me to assume, then, that fun-

damentally what, the task in rate making is to project costs, total costs of service and to project a rate that would recover that cost?

A. Well, you use the term "project". We are not allowed to project into the future. If you mean project by being historical cost, yes, we project that. But I — just to clear the record. What we do is look at something that has (14) happened already. We look at the historical expenses, and we assign, allocate, or if it is a direct assignment, we place it directly. If it is an allocation, we develop the most appropriate allocation that we can in coming up with that allocation.

We then assign to that particular class all those expenses which are appropriate to that class.

Q. When you use the term "class", I take it you are referring to some designation in the rate structure such as residential or commercial?

A. That is correct.

Q. So that within a class you project — I will withdraw the word "project" — you use the costs as you determined them for that classification in arriving at a rate; is that essentially correct?

A. The costs are the basis for our design of rates.

MR. COHEN: Just to clarify the record. Is my understanding correct that the costs that you use are based on a specific test period in the past?

A. For rate case purposes, they are a test period. Such as in the last case, the period ending September 30th, 1972.

Q. (By Mr. Nelson): In addition to costs, do you plug in any other factors in asking for a rate, either increase or decrease, other than cost?

(15)

A. At the present time, the, my main objective is to design rates by cost of service. Now, as I mentioned —

Q. May I perhaps shorten it by asking this question. Do you consider the rate of return at all in determining the ultimate rate? I have always assumed you did.

A. The rate of return in my definition is part of the total cost of service. I am sorry that — possibly I was not

clear there. But as I view cost of service, that is a, a total requirement, or a requirement of the design of the rate.

Q. In other words, do you include, then, in cost, what I would call a profit figure above and beyond out of pocket expense in order to arrive at cost for purposes of rate of return?

A. Included in the total cost is a, is a return of interest expense on our debt, dividends for preferred stock, and a return to the common stockholder. So I believe, yes, it is what you are saying.

Q. To orient me, then, in figuring your rate requirements for various classifications, you address yourself to costs as distinguished from your investment?

A. The investment is required in order to determine what your total cost will be, because you earn a return on the amount of investment that, that is required to provide the service.

See, in the utility business, the allowed return is based on a rate base. Rate base is (16) composed of the net plant plus an allowance of working capital. So when you, when you receive a rate of return — for instance, in our case of seven point eight six per cent — that is applied to that rate base, and each of the classes have been assigned a certain portion of that rate base. So your return is tied back to investment. So that is just one component of the total cost.

Q. I understand. Are these rate cases —

MR. COHEN: Off the record.

(Discussion off the record.)

Q. (By Mr. Nelson): These rate cases that you have participated in, have you, yourself, testified in them?

A. I have testified in this last case, U-4257. I had a very minor appearance in the prior case. The other ones I have been active in, in a capacity of preparation of material.

Q. But as director of the department, would it be safe for me to assume that you, in any case, would have knowledge of all matters that your department submits to the Commission in a rate case?

A. I think a reasonably fair knowledge.

Q. Would it be in that cost picture that you projected,

that you take into account, do you compute — I think you indicated a cost of total plant, is that correct?

A. We use the total plant, or net plant as a basis for the (17) return component. This is off the books of the company.

MR. COHEN: May I go off the record.

(Discussion off the record.)

Q. (By Mr. Nelson): Let us start, back on the record, then, with the concept of rate of return, as you have used it, and will you state on the record, sir, your definition of rate of return.

A. Okay. Rate of return is the division of operating income which in my definition is the, the sum of bond interest, plus preferred dividends, plus the return to the common equity holder. That total is divided by rate base, which is the sum of net plant plus working capital that will equal rate of return.

Q. In a rate case, this is all relevant to a particular test period?

A. That is correct.

Q. The concept that you have of your plant, as figured in that formula, is a computation of the total dollar amount of plant that you have, is that correct?

A. It is the original cost of the plant installed by the company for the service to the customer. It includes all the general offices, the warehouses, the generating plants, lines.

Q. Would it include the Detroit Edison offices where light bulbs (18) are dispensed?

A. If it were, if they were company-owned offices, it would include that investment, also.

Q. Does Edison lease any offices?

A. Edison has leased certain customer offices.

Q. I am talking of a service center or customer office. They do lease some of them?

A. They have leased some of the customer offices.

Q. When you lease an office, how do you determine, for purposes of plant, what — how do you evaluate the lease or put it into your plant base?

A. The lease isn't included in the plant base. The lease cost is included in the total expenses.

Q. Within that same framework, from the standpoint of the payroll of employees who work at a service center, what is done with the payroll cost in this formula? Where does that appear?

A. All of those expenses are included in the total labor cost, which is included in the income statement, so that you, you have revenues less expenses resulting in that operating income that I was talking about before, so that labor cost would be included in the total labor.

Q. I would assume if we take a service center or a customer center, if we can call it that, that it would have other (19) expenses in addition to labor, such as heating, lighting, telephone, perhaps property taxes and other expenses. The total complex of expense that goes up to running that service center. Are there any expenses that are not included in either the plant base or in —

MR. COHEN: I am going to object. You asked him, "I would assume" as if it were a question, and then you went on and asked him whether that was correct or not.

MR. SKLAR: Do you want an answer?

MR. COHEN: Do you want an answer to that, or is that an assumption?

MR. NELSON: I don't understand the objection.

MR. COHEN: The objection was you made a long assumption.

MR. NELSON: All right, I will rephrase it.

Q. (By Mr. Nelson): It is true, is it not, that the customer service centers incur a lot of expense in addition to labor, such as taxes, heat, telephone, light, and the like. Is that true?

A. I am not sure what a lot is, but the, there are other expenses besides labor.

(20)

Q. Perhaps you could list them for us and we would not have to speculate.

A. I guess I am not sure that I know all the expenses that occur in a customer office. Those items that you men-

tioned would probably be all recognized in most customer offices, but I don't know if that is an inclusive list or not. I would agree that —

Q. Are there any expense items or out of pocket dollars that Edison has to spend in order to maintain customer offices that are not included somewhere in the rate base?

A. There have been.

Q. For instance?

A. The merchandising function of the company had been excluded from the rate base and from the expenses of the, in our rate cases.

Q. You say "had been"?

A. They have been. They have been recently, the last case.

Q. When you say "merchandising functions", what do you include in that concept?

A. The selling of appliances, both major and traffic appliances.

Q. And your repair, is that included in your rate base, the cost to repair, appliance repair?

A. The cost of repair people have been included in the allowable expenses and in the rate base.

(21)

Q. What about the bulbs, themselves, in what we have referred to as the bulb program? Are those bulbs within the merchandising concept that you said is excluded, or are they included?

A. They are included in the total expenses of the utility in the rate making procedure.

Q. In connection with the distribution of bulbs at these centers, can you tell me where you have, or Edison has, an independent agent such as a private drugstore or a party store, and the like, as its agent, does it compensate that agent in any way?

A. I am sorry that I cannot answer that: I don't know the procedure in that case.

Q. The other factor of the formula that you gave us, sir, had to do with the computation of interest, preferred

dividend, and some provision for common dividend, is that correct?

A. Yes.

Q. And you call that part of the formula computation of what?

A. That part was the operating income, which was the numerator of the, the formula.

Q. As I understand the formula, you take your total rate base, including plant and working capital, and add it together for the base period, is that correct?

(22)

A. That is correct.

Q. And then you take the operating income and determine what the rate of return is on that base?

A. Yes.

Q. And Edison historically receives what rate of return?

A. Detroit Edison was granted a rate of return, composite rate of return of seven point two per cent in the, in their first rate case, U-3819. They are granted a composite return of seven point three nine per cent in the second rate case, which I believe is U-3697. They were granted seven point seven eight per cent in U-3910, and they were just granted seven point eight six per cent rate of return in U-4257.

MR. COHEN: For the record, can we have at least the years on this.

A. The first case was decided in April of 1970. The second case was decided — I am sorry. January, 1971. The third one was August, 1972, and the fourth one in January, 1974. The period that these cases covered was from 1968, the first case, had a test period of 1968, and the most recent case had a test period of twelve months ending September 30th, 1972.

Q. (By Mr. Nelson): Let me try something to see if I understand the formula. I would take it that from what you have indicated, that in connection with the light bulb program (23) there are certain building and operating ex-

penses that are incurred by Edison in order to distribute light bulbs under the program. This certainly is a correct statement, is it not?

A. There are portions of buildings and portions of facilities that are required for the program.

Q. What you are saying is that some part of the building costs, some part of the labor cost, some part of the taxes, or whatever other expenses there are, could be segregated, I suppose, at least theoretically, to determine the rate base of the light bulb program? Is that a fair statement?

A. An allocation could be made of that nature, yes.

Q. And, in effect, in the manner in which your rates are computed, that is done, except that that segregation is obligated so it cannot be separately seen, is that a fair statement?

A. No, I don't think it is quite a fair statement.

Q. In what respects is it not fair?

A. The light bulb program does have an assigment of the various expenses that are attributable to the program.

Q. What expenses are they?

A. The cost of the particular bulbs. An allocation of the marketing personnel who are handing out the bulbs. An allocation of the general and administrative expense of the (24) total company.

Q. Are those all of the matters that are allocated to it?

A. There is a certain amount of — well, working capital that, a small amount of working capital is assigned to.

Q. Has that ever been done, to your knowledge, since you have been in the department, that somebody has sat down and allocated plant and working capital to the bulb program?

A. Not plant, sir. The expenses have been allocated to the program.

Q. In other words, you do not allocate any cost of owning the building to the light bulb program?

A. No, sir.

Q. And you do not allocate any cost of heating or paying taxes on or insuring the building to the light bulb program?

A. I don't believe so. I am not entirely positive of what all is in the general and administrative expense, but I — I would have to review that. I am not positive on the taxes and insurance.

Q. Have you ever prepared or submitted to the Michigan Public Service Commission any data separately setting out the, what I might call the fully allocated cost of the light bulb program?

A. I guess if you could expand somewhat on that. Do you mean specifically for the light bulb program? Just taking (25) something up and giving them something regarding the light bulb program? Or as a part of something else?

Q. No.

A. See, it is included in our cost of service.

Q. I am asking it, sir, on the basis as to whether it has been segregated out either as part of something else, but segregated in an identifiable way so that all of the costs fully allocated, the buildings, and the heating, and the taxes, and the personnel, Workmen's Compensation, et cetera, of the light bulb program, have been computed out and listed in some separate way? Has it ever been done? First of all. And, secondly, if it has been done, has it ever been submitted to the Michigan Public Service Commission?

A. As part of our rate cases, we have submitted working papers supporting our cost of service studies. In the cost of service studies are included a breakdown of the expenses which are both directly related to the light bulb program, and then those expenses which are of an allocable nature, which would remain, whether the light bulb program was in effect or not. But it was, they were assigned a certain portion of A & G expenses.

Q. But no total computation, I take it from your answer, has ever been made with respect to the bulb program as an entity in and of itself?

(26)

A. Well, nothing further than what I answered. Now, I guess I —

Q. Well, perhaps —

A. How complete do you mean? I — we have assigned —

Q. The distinction —

MR. COHEN: Let him finish his answer.

A. We have assigned the direct and the, that portion that was allocable.

Now, we did not assign plant. And if, if you feel that plant was necessary to assign, no, we did not assign that.

Q. (By Mr. Nelson): Well, I want to put it in this context. If we presume that we do nothing other than distribute light bulbs from service centers, we could surely compute the cost of what we were doing in one computation?

MR. COHEN: I am going to object to that question and direct him not to answer, because that is a presumption which is totally unsupported by all of the testimony that you have had to date. In fact, it is controverted by the testimony you have had to date.

Q. (By Mr. Nelson): You indicated, Mr. Daniels, that there were cost of service studies made, is that correct?

A. Yes, sir.

Q. Do you have in your possession, or in your department, (27) a copy of such a cost of service study?

A. I have work papers which have been submitted to the Public Service Commission, which include certain cost of service studies.

Q. In the interrogatories that were filed, I think particularly interrogatory number five, we requested that we be furnished as exhibits all general service rate filings made by Edison which evidence or show the amount of expense allocated to the light bulb program for the years 1967, '68, '69, '70, '71, '72, and '73. Prior to today, were you ever made aware of that interrogatory?

A. I have seen the interrogatory.

Q. And were you asked by Mr. Nern or Mr. Cohen to prepare any material for answer to that interrogatory?

A. We had prepared certain amounts of information.

Q. First, let me withdraw that and say that the answer that is submitted is that during the period 1967 to 1973 the Detroit Edison Company has had the following general rate cases, and therein are listed four cases: U-3189, U-3697, U-3910, and U-4257. The remaining part of that answer is as follows: All work papers and other material used in the preparation of these findings will be available to Plaintiff pursuant to the introduction hereto.

Did you assist in preparing that (28) answer?

A. I did not prepare that particular answer. I told the, Mr. Nern, that we had the background data.

Q. Were you aware that Mr. Nern subsequently delivered to us at our request, as a follow up to that answer, certain material on interrogatory number five, which has been called a spread sheet, for case U-4257?

MR. COHEN: Let us take a short break. I want to get Chris in here, because he is the one that knows all about this.

MR. SKLAR: Okay.

(Interruption.)

Q. (By Mr. Nelson): I will redirect the witness' attention to interrogatory number five in which we requested the amount of expense allocated to the light bulb program for years '67 through '73, and have asked the witness if he had any responsibility for the preparation of answers to that interrogatory?

A. I answered that I was, I had worked with Mr. Nern in providing some of the information.

Q. And were you aware that subsequently we did ask for the information that was alluded to in the answer?

A. I was not aware. I was — I am aware that there were other things submitted, but I was not aware of what they were.

(29)

Q. Did anybody else in your department then have responsibility for submitting any documents to us or to Mr. Nern in connection with that interrogatory?

A. There were other people in my department that worked with Mr. Nern from time to time, yes.

Q. As I understand it, Mr. Nern is here, that the document that we were given in response to our request, based on the answers to the interrogatories, is this so-called spread sheet in case U-4257. Are you familiar with that?

A. Yes, I am.

Q. And on that spread sheet in connection with our question on the lamp exchange program is the third line item lamp exchange, commercial, listing certain numbers after it, and beneath that domestic, and listing again certain numbers after it, is that correct?

A. Yes, sir.

Q. Did you submit any other documents to Mr. Nern relative to the interrogatory other than this one spread sheet?

A. We submitted some rate sheets.

Q. By "rate sheets", you mean, you mean what?

A. Well, let's see. Excuse me a moment. I will go through my file.

Under interrogatory number nine, there is a request for exhibits and all orders of the Public (30) Service Commission which grants approval for the current light bulb program. That is not the exact statement, but I was just paraphrasing it.

Q. So the reference to the other documents that you have, in response to my question, would be the documents submitted in response to interrogatory nine, is that — ?

A. That was to nine, yes.

Q. And, for the record, those documents consist of what we might call "rate sheets" for basically domestic and commercial service starting with 1916 to 1972, of which there are a number of sheets.

A. On interrogatory fifteen, sixteen and seventeen, we have discussions on the, that material. I am not sure that we provided material to Mr. Nern, but we, we discussed the material and the answer.

MR. COHEN: Could I ask — I think it would be helpful at this point in the record, if you have no objections — if you do, I can do it on direct — but in answer to interrogatory nine, to make it an exhibit at this place in the deposition.

MR. NELSON: We have no objection to that request.

MR. SKLAR: No.

MR. NELSON: Why don't we do it now, (31) mark both of them as exhibits.

MR. COHEN: Right.

MR. NELSON: Mark the spread sheet as Exhibit 3, and mark the other one, interrogatory nine, as Exhibit 4.

(Whereupon documents were marked Plaintiff's Deposition Exhibits No. 3 and 4 by the Reporter.)

MR. NELSON: We will next state for the record that in this series of depositions the Plaintiffs are marking exhibits in numerical sequence, from witness to witness to witness, so that there will only be one numerical series of exhibits.

Q. (By Mr. Nelson): You have indicated, Mr. Daniels, in response to my former question on exhibit five, what has now been marked as Exhibit No. 3, is the spread sheet that was given to you by Mr. Nern, and you have indicated the documents attached in response to interrogatory number nine, which is now Exhibit 4, and you alluded, I think, to the answers to paragraphs fifteen, sixteen and seventeen of the interrogatories, is that correct?

A. Yes, that is correct. And we also conferred on interrogatories number ten, and twenty-three, as far as discussion was concerned.

(32)

Q. So that, does that —

A. That was the extent of our discussions with Mr. Nern.

Q. Now, to the extent, then, that those documents have been supplied to us, I take it that constitutes the answers to interrogatory number five relative to documents that are described in interrogatory number five, just so I, the record is clear on it.

A. Without having reviewed that, your exhibit —

Q. Would you like to review it again?

A. Yes, I would.
Q. Which one would you like?
A. Number three. Yes.
(Interruption.)
Q. (By Mr. Nelson): Mr. Daniels, as I understand your answer, then, is that all of the documents that we requested in interrogatory number five showing the amount of expense allocated to the light bulb program for the mentioned years, have been supplied to us, is that correct?
A. That is correct.
Q. Consisting of that spread sheet and those tariffs that we had, and the others to interrogatories that you referred to, is that correct?
A. Yes, the interrogatories that were mentioned, all material was supplied.

(33)

Q. And you personally, I gather from your answers, have shown an awareness of all the interrogatories that we have here by the references that you have made, is that true?
A. I have either discussed them with Mr. Nern, or people in my department have discussed them with Mr. Nern, and I was aware of their, their contact with him.
Q. So that you and your department, then, have made a deliberate effort, certainly, to try to comply with this interrogatory and to furnish us with all documents?
A. We have supplied to Mr. Nern the documents which are described in the answer.
Q. I would gather, then, Mr. Daniels, then, from that, that the only document in which there is a reference to the lamp bulb program or expense allocated to it, is the one spread sheet?
A. You mean in 4257?
Q. Within the period of time that we have indicated?
A. That we had in our possession, yes, that is correct.
Q. And that question, of course, was in reference to documents filed with the Public Service Commission?
A. Yes, sir.

Q. So that you do not have in your possession, or in the possession of your department, any separate sheet allocating expense to the lamp program?

(34)

A. You mean besides what we have submitted here?
Q. Besides what we have.
A. No.
Q. Certainly you do not, because — ?
A. What we have submitted to you has been submitted to the Commission.
Q. And that is all of it?
A. To my knowledge, that is all, yes.
Q. Okay.
MR. COHEN: I am going to have a short discussion, the record should show, with the witness.
(Interruption.)
MR. NERN: Could we let the record show that the lamp release form for the free bulbs which were discussed in Mr. Blok's deposition have been provided to Plaintiff's counsel.
Q. (By Mr. Nelson): Well, getting back on the record of the deposition, this Exhibit No. 3, Mr. Daniels, which is an exhibit that was given to the Michigan Public Service Commission, what was the purpose for giving this to the Commission?
A. Exhibit 3 in this deposition was a portion of the work papers which were submitted in the case U-4257, the main part of this exhibit, that is, was submitted in 4257, (35) for the purpose of supporting our unit cost calculations for the domestic and commercial rates, and the basis of the exhibit, or the use of the exhibit, was to develop cost curves from which, or on which revenue curves could be compared to. So the components of the costs that were assignable to residential and commercial customers were defined more completely.
Q. This exhibit, then, is related only to a part of the submission, apparently, that was made to the Commission at that time, is that correct?

A. It is a portion of the underlying work papers that support the cost of service of the company in that case.

Q. Let me ask you. Have you ever participated in any Commission hearing where you were requested to supply data to the Commission from the standpoint of rates, where at issue was a question as to whether or not there was any need for the bulb program?

A. I have never participated in hearings where the bulb program was questioned.

Q. Do you have any knowledge of any hearing concerning the bulb program where data from your department might have been furnished?

A. I am aware of nothing where the bulb program was questioned. I am only aware of, of references by the Commission to the (36) bulb program, but nothing, not to questioning the bulb program.

Q. In any event, there has never been any hearing, to your knowledge, with the Public Service Commission as to whether or not there was any need to have a bulb program, whether it should be continued or abandoned, of that character?

A. To my knowledge, I am not aware of any question by the Commission.

Q. You are not aware of any formal Commission consideration of that issue, at least, is that correct?

A. That is correct.

Q. And I notice from the one exhibit, which is Exhibit 4, now, all these rate sheets that are attached to it, that from time to time the description of the bulb program for residential users, commercial users, has been changed; certainly you are aware of that?

A. The sheets that are attached have a varying provision for the lamps that were exchanged.

Q. For instance, at one time, I think, on the commercial rate ending, I think, if I am correct, in '64-'65, there was a provision in there for a reduction of a customer rate on the basis of kilowatt hours for those who elected not to take bulbs. Are you familiar with that?

A. Under the commercial rates, there was a, a provision to (37) receive a reduction to the stated rate.

Q. And today in the rate sheet that has been furnished to us with that exhibit, there isn't such an option, is there?

A. Not — no, there is no option. There is no reduction to the stated rate for customers who do not take bulbs.

Q. Have you ever participated or supplied any data, evidence-testimony, to the Michigan Public Service Commission, at any hearing in which that particular change in the rate sheets went into effect?

A. That change went — you mean the elimination of the — ?

Q. Of the option.

A. — of the option? The elimination of the option took place in 1964 when the Detroit Edison Company was reducing their, their rates in general. It was a three and a half million dollar reduction of rates. And as the, as a part of that reduction, the elimination of the option took place on the basis, or as a part of that reduction; it wasn't necessarily the, the reason for the reduction, but as a part of that reduction program the option was eliminated, and the — I submitted data which would provide the Commission with the knowledge of how large a total reduction we were talking about.

Q. Speaking in totals, I assume, you are saying, is that correct? Total reduction.

(38)

A. Total reduction, right.

Q. But from your previous answer, is it correct to say that you did not submit any separate data to the Commission at that time relative to the light bulb program itself?

A. There was no cost data that was submitted to the Commission.

Q. Have you ever submitted any data, cost data, to the Michigan Public Service Commission at any time since you have been in the department with respect to the quantity of bulbs that a customer should be permitted under the program?

A. Quantity the customer should be — ?

Q. Should be permitted to receive.

A. I cannot specifically think of a time. But I, I am sure that in the period there were statements of the policy that the company has regarding —

Q. But I am speaking of computations.

MR. COHEN: I object. I think he ought to be allowed to finish his answer.

MR. NELSON: All right.

A. I am not aware of the, any submissions of the rules of how many bulbs would be submitted to any particular customer.

Q. (By Mr. Nelson): You are not aware of any such computation, at least, that you have prepared?

A. Well, I guess — I guess I don't understand what you mean by "computation".

(39)

Q. Have you submitted any data or work sheets, spread sheets, to the Commission in respect to the question of how many bulbs a customer should be entitled to receive under the bulb program?

A. Not to my knowledge.

Q. And with respect to the specifications of these bulbs, such as comparing bulbs with different lumens, hour life, wattage, safety features, have you ever submitted any spread sheets or cost data to the Commission contrasting or comparing different bulbs?

A. I have not, and I am not aware of any that have been.

Q. Have you ever submitted to the Commission any spread sheets or cost data to determine within the language of the, of the rate sheets, those bulbs that were approved for the program and those that were not to be approved?

A. No, I have not, or I am not aware of any that had been.

Q. Have you ever submitted to the Commission any spread sheets or cost data with respect to various kinds of lighting devices, and comparing them, such as fluorescent tubes, mercury lights, incandescent light bulbs, or other forms of lighting devices?

A. Now you are speaking strictly of the home or business use of these lamps, and not of our street lighting programs, and things of that nature?

(40)

Q. That is correct.

A. No, I have not seen any.

Q. Have you ever submitted any cost data?

A. No, I have not submitted any.

Q. Have you ever submitted any spread sheets or cost data to the Commission comparing or contrasting different methods of distributing light bulbs, whether they be through your own offices, through an agent or by delivery truck?

A. No, I have not.

Q. Have you ever submitted to the Commission any spread sheets or cost data directed to the issue as to what would distinguish Detroit Edison from any other public electric company which does not furnish light bulbs?

A. No, sir.

Q. To your knowledge, has there ever been any study made by Edison with respect to why it, in its program, would furnish bulbs, whereas other Michigan electric utilities do not?

A. This would be only a, a knowledge of the higher light levels and the greater utilization, in this particular area, because of the lamps being provided, but I am not aware of a, a study to determine why we give free light bulbs.

But I — it is a little bit dislocated here, because I am aware that the, the wattage of, of the lights of our customers is a higher level wattage (41) than in other areas. But I have never submitted anything of that nature.

Q. With respect to your own department of rates and regulation, have you ever participated in any Michigan Public Service Commission proceeding wherein there was consideration given to the method of controlling the light bulb program, or creating reporting requirements for it?

A. No, sir.

Q. Have you ever participated in any Michigan Public Service Commission in reference to your own department, certainly, at which there was at issue the question of what

is the best method to light residences or commercial establishments?

A. No, sir.

Q. Have you ever participated in any proceeding at which the question was considered by the Commission, or for which you submitted any spread sheets or cost data contrasting the fact that the residence rate permits the distribution of these bulbs to first time connections, whereas the commercial rate does not?

A. Could I have the question back. I have missed the first part of it.

Q. Have you ever participated in any Michigan Public Service Commission proceeding, or submitted any cost data or spread sheets to the Commission, where the question was considered (42) as to why the residential rate sheet would prescribe a supply of bulbs for first connections of residences but would not supply a first supply of bulbs for first time connections of commercial etablishments?

A. No, sir.

Q. Have you ever participated in any cost presentation to the Michigan Public Service Commission wherein it was considered, where a customer center should be located with respect to customer accessibility?

A. No, sir.

Q. Since the rate sheets that have been presented to us indicate that lamp renewals, both for commercial and residential, are to be made on the basis of the usage of electricity, have you ever submitted to the Commission any cost data or spread sheets with respect to a computation of usage in order to entitle one to receive bulbs?

A. No, sir.

Q. And, I take it, then, that there has never been any cost study or presentation of that type made to distinguish the uses of electricity in a residence for lighting purposes as distinguished from any other purpose?

A. Not to my knowledge, I don't know that one has been made.

Q. Have you ever presented any cost data or other similar material to the Michigan Public Service Commission concerning (43) what advertising standards, or advertising program, Edison should conduct relative to the bulb program?

A. No, sir.

Q. Have you ever participated in any proceeding with the Michigan Public Service Commission wherein it was under consideration the development of any accounting standards for Detroit Edison with respect to either the accounting department or your own department relative to allocating expenses of the light bulb program?

A. No, sir.

Q. Have you ever participated in any Michigan Public Service Commission proceeding wherein it was charged that Edison has violated the provisions of the light bulb program?

A. No, sir.

Q. Have you ever participated in any such proceeding wherein you were asked to submit cost data on the question of whether or not bulb users, large commercial users, or other classifications in the rate sheets, should be included in the bulb program?

A. No, sir.

Q. In the affidavit, Mr. Daniels, that you supplied as part of the motion — do you remember that affidavit?

A. Yes, sir.

Q. I redirect your attention to paragraph seven of your (44) affidavit. Do you have that before you?

A. Yes.

Q. In paragraph seven, it is indicated that the amount which constitutes the allowance for the cost of incandescent lamps exchange is not computed in a manner which affords the Detroit Edison Company a profit on those lamps which are exchanged, but rather that this amount is figured similarly to the expenses incurred for labor or fuel cost. Do you see that?

A. Yes, sir.

Q. It is true, is it not, that the rate of return that you described earlier of the Edison Company is computed taking into account, really, all of the expense of the bulb program, is that a fair statement?

A. Yes, just as the fuel and labor expenses are concerned.

Q. So that if the Detroit Edison Company realizes a, something left over to distribute to the preferred stockholders and to the common stockholders, that consideration has already been made in computation of the investment base to allow for the bulb program, has it not?

A. Computations were made for the investment — you mean a rate or return has been applied to the rate base?

Q. Yes.

A. There is an indirect, indirect relationship between the (45) expenses and the working capital, yes.

Q. So that if the system that you project should come to exact fruition when you compute the investment base and the working capital and the income, if the period you have chosen should, in fact, occur precisely in the next period, the return would include, would it not, a return of profit on all of the expense of the light bulb program?

A. No.

Q. Perhaps you can explain to me why that is not so.

A. What you have in the rate base is a working capital component which is partially based on what is called one-eighth or a forty-five days of operating expense. That is a portion, then, of the operating expenses that go into that rate base calculation.

Q. But are not all of the light bulb program expenses in the operating base?

A. In the expenses? The total expenses?

Q. Yes.

A. Yes, they are in the total expenses.

Q. And would not the buildings and such be included in the investment base?

A. Which buildings?

Q. The customer service centers.

A. All customer service centers are included in the base.

(46)

Q. So that actually in a cost accounting sense, am I correct in saying that even though it has not been allocated, that all expenses of the bulb program, buildings, labor,

et cetera, all of it, is included in the base on which the rate of return is computed?

MR. SKLAR: Off the record. Let us talk for a second.

(Discussion off the record.)

Q. (By Mr. Nelson): Is it advantageous in the computation of the investment and working capital base to add as many expenses to that as is permissible?

A. I guess you do not add expenses to the base. That is —

Q. In computing the base.

A. Well, in one small portion of the working capital, there is a, a reflection of expenses in there, yes.

Q. I thought we had agreed that all the expenses of the bulb program were somewhere either in the investment base or else in the working capital base?

A. Well — what we had agreed to, I believe, is that the investment for the customer offices is included in the net plant.

MR. SKLAR: Let me see if I can just maybe get into it.

MR. COHEN: Off the record.

(47)

(Discussion off the record.)

CROSS EXAMINATION
By Mr. Sklar:

Q. In order to operate, Detroit Edison has to bring in more revenue than its expenses; I think that is axiomatic, don't you agree?

A. What do you include in expenses there? Is expenses — ?

Q. I am including everything you included as expenses, eliminating — well, in including everything you included as expenses. Whatever you want to define as expenses.

A. If you are talking about expenses being, or not including return component, then —

Q. I am talking about excluding the return component. I am speaking strictly of what in traditional accounting

sense would be considered expenses that are deducted from revenue before defining net profit.

A. In that case your revenues have to exceed your "expenses".

Q. Okay. And I will go so far as to ask you in the case of Detroit Edison — strike that question.

So in order for Detroit Edison to make a profit — and by "profit" I define for our purposes the items that you indicated to be returned on, on investment, the interest on its bond indebtedness, its dividends for stockholders, and in addition to its retained earnings to common shareholders — in order to generate a profit, (48) Detroit Edison must sell or otherwise dispose of certain profits or services for more money than it paid to receive, to acquire them, isn't that correct?

A. Paid to acquire them? They paid the stockholders something —

Q. I am eliminating —

A. Okay.

Q. I am eliminating what it had to pay to acquire cash for capital investment purposes. I am simply saying, in order to sell the services which it is able to sell, and the, in the ordinary course of its business, as distinguished from the sale of its capital assets, in the ordinary course of business, its property, tangible personal property, that it sells in the ordinary course of its business, or distributes in the ordinary course of its business, including light bulbs, it must sell or distribute all of them, all of these things, for more money than it cost to acquire them?

A. Under that premise, that the return component is not included in it, yes.

Q. That is correct? Okay.

In that sense that I have just described with lamps which are used in the exchange program being a personal property which Detroit Edison distributes in some fashion, does not Detroit Edison, and in view of the fact that the cost of that, of acquiring those bulbs, (49) the expense, are included your expenses for the purpose of calculating a rate, does not Detroit Edison make a profit on its bulbs?

A. They include the total cost into the, their expenses —

Q. By "cost", you mean the cost of purchasing those bulbs?

A. Buying the bulbs.

Q. Right.

A. I guess I am — I don't see your, your connection there; because the expenses are included in the total cost. So the expenses are covered by revenue.

Q. That is correct. But you get more revenue than you have expenses, if we rule out interest on bond indebtedness, and so forth, and return as a cost. Revenue is more than your expenses. We have already established that.

A. Would you back up and tell me where we have established that. Is that your hypothetical, that in order to make a profit on the business, you, the revenue has to be greater than expenses?

Q. That is correct.

A. That is fine for the business by itself. I am a little mystified as to where we got the, the establishment that it is the case with the lamps.

Q. Well, I am asking you. We did not establish it yet.

A. Okay.

(50)

Q. I am asking you a question, and if you want to answer "no", then, you can answer it "no". It just seems to me almost, almost a foregone conclusion that the answer would be "yes"; but you certainly are able to answer "no", if you want to.

MR. COHEN: I think the record should show he already answered "no" once. I think the same question was asked by a previous question, and that you have asked him for an explanation of his "no" answer, and then you come back with a question again.

MR. SKLAR: That is correct. I am attempting to see if we can identify the thinking that went into that "no" answer, and perhaps we can get a "yes" answer. It may simply be a question of definition, and since we are, since we are attempting to establish concepts, and not, and differences in definitions could come up with misleading, unintentionally misleading answer, it might be misleading to

the court, to the parties, I simply want to know an answer in terms of concepts that I understood them and establish an answer in terms of that.

MR. COHEN: I might say that the statement, the statement you made for the record in regard to understanding of concepts could lead to misunderstanding of answers, in terms of answers, it could also lead to misunderstanding in terms of questions that are being asked.

(51)

MR. SKLAR: Okay.

A. If you have expenses of purchasing those bulbs, they are going into the total expense of the, the utility. If they come out — you have a purchase cost which the company is paying for the bulbs, and that is included in the total cost of the program. Total overall cost, then, comes down through the, the income statement.

Now, there is no markup on those bulbs.

Q. (By Mr. Sklar): Well, you do not charge any money for them.

MR. COHEN: I would respectfully request he finish his line of thinking.

The question was "Why"?

A. The bulbs are, are not added into the total cost with a markup such as GE or Westinghouse or whoever might place on them. They flow through at the expense of the cost the company receives them at.

The, I guess along the line that the other gentleman was speaking: He asked whether the stores or shops were included in the rate base. Yes, they are included in the rate base. But I don't, I disagree with the premise that they are there for the lamp bulb program. Maybe this is where we are having our hangup.

Q. (By Mr. Sklar): No, I don't think we are having a hangup. (52) I just —

MR. COHEN: I am going to object to any further questions. The question that was originally asked him was why he said: No, there was no profit.

I understand you have answered why you think there is no profit in the lamp bulb program, is that correct? And you have made your statement.

But I don't want, I am not going to let the witness get into a situation of arguing with counsel as to what he means, rather than simply answering the question.

MR. SKLAR: I understand. Let me see if I am certain in my mind that I understand the reason for, for the answer "no", and correct me if I am wrong.

Q. (By Mr. Sklar): It is simply that the light bulbs pass through, that is to say, Edison pays a certain amount of money for the light bulbs to GE or Sylvania or Westinghouse, or whoever, that that cost, if it goes down because of a decreased use of the light bulb program in a year, will be reflected in a reduced cost in total expenses submitted in connection with some rate request in the future, either up or down. Is that the reason for your answer "no"? Maybe I don't understand. And if I don't, I want to understand why.

(53)

A. Yes.

Q. Maybe I am slow —

A. No. No.

Q. — in the matters of accounting, but I do want to understand why you answered "no".

A. The costs of the program as, if there were a reduction in the cost of light bulbs, then upon another rate case proceeding, that reduction would be reflected in the proceeding, would be included in the requirement that they, the company would have for that class.

Q. That would be true with respect to any commodity or service that you buy, if the cost of that commodity or service in any particular year went down, it would be reflected in the next rate change request?

A. Yes; if coal costs go down, if labor costs go down.

Q. So then, would you make the same statement about any other material that you buy, that you make no profit on it?

A. I guess we make profit on, on investment. I don't see that we make profit on expense.

Possibly I am not understanding, or not following your procedure. But the, the investments that we have are the basis for our profit determination, and that is the, the in-

dex or the base that is used to determine our profitability, or our profits. I don't see (54) a profit being made on a dollar's worth of labor.

Q. Detroit Edison sells electric energy and it sells certain other things, distributes or sells light bulbs, and I am speaking, let us say, distributes light bulbs, distributes products and services to the public, and it seems to me unless it makes a profit on what it sells it will not make a rate of return on its investment. Am I not correct?

A. The end result of your sales is that the difference between expenses and revenues will provide a rate of return, so all expenses are included in that calculation.

Q. Okay. And you would still maintain that you do not make a profit on the distribution, on your light bulb exchange program?

A. Can I go off the record?

MR. SKLAR: Sure.

(Discussion off the record.)

(Question read.)

A. Yes.

MR. SKLAR: Okay. Mr. Nelson, do you want to go on.

MR. NELSON: Okay.

(55)

RE-CROSS EXAMINATION
By Mr. Nelson:

Q. I am not sure if you have any familiarity with this aspect of the case or not. We were given by Mr. Nern several billing statements that are submitted to Edison customers, including, at least, eight or ten of them here, which are inked in showing the period during which they were in effect. Do you see those?

A. Yes, sir.

Q. And I have noted by looking at these that on the one that is marked October, '73, to date, there is a box: State tax.

A. Yes, sir.

Q. And that on the one that is marked 10-73, similarly there is a box marked "State tax". Do you see that?

A. Yes, sir.

Q. For the one that is marked from November of '72 to September of '73, similarly there is a box marked "State tax".

A. Yes, sir.

Q. And that those that are prior to the last mentioned date do not have on the customer billing a similar box.

A. Those that you have in, are the, the coupons that you are showing me, do not have that box, that is correct.

Q. Do you have any knowledge about the inclusion of the box on the customer's bill after October of 1972 in which that particular box captioned "State tax" was included?

(56)

A. The only knowledge that I have of, regarding that, was recollection of the discussions on changing the bill form. I was not an active participant in the change, but I, I am aware that there were changes made to that bill form, but I cannot say why the box was or was not there prior to that date.

Q. But in addition to being a mere change of the form, it has to do with the question of whether or not prior to that date customers were charged a state tax, is that true? Because on previous bills they are not charged as state tax.

A. That — I don't think that statement can be made without knowing what was in the total.

Q. Well, I will readdress the question, then. On the statement marked from January of '72 to October of '72, do you see any separate category of charges on there that is denominated as "state tax"?

A. There is no indication that there is state tax in the bill. However, there is nothing to say that state tax was not included in that bill.

Q. At least it is not stated as a separate category?

A. It is not separately noted.

Q. And there are on these bills, are there not, certain code numbers or the like relative to the particular item?

A. There are various boxes —

(57)

Q. For example, I see a "PB", and down below it says "PB" means previous balance.

A. Yes, sir.

Q. "BPA", balance previous account; "EW", electric water heating included, and the like. Do you see any indication on there that there is any computation on the bill of the state tax?

A. There is nothing of a state tax, nor of a federal income tax, nor any other tax listed.

Q. In paragraph eight of your affidavit that was filed with motion for summary judgment — do you have that before you?

A. Yes, sir.

Q. — you have indicated that the Michigan Public Service Commission reviewed the Edison rates. Do you see that?

A. Yes, sir.

Q. Have we covered all aspects of your knowledge on which that has occurred?

A. They have been reviewed through the procedures of the rate cases that we have discussed.

Q. And the character of that review, as you know it, and of your knowledge, has already been described by you, has it not?

A. I believe that we have discussed the, all points, other than — I am sorry — other than comment that, and discussions that I have had with staff members, but this was not on a study (58) basis, it was more of a —

Q. Informal — ?

A. I guess informal awareness.

Q. But as far as any formal review is concerned, we have covered all facets of it?

A. Yes. If you consider that the Commission audits the company's books for purposes of the rate cases, we have covered it, yes.

Q. When Mr. Cohen indicated that earlier, I take it you are speaking of your, an audit of your general accounts such as you have described elsewhere in these interrogatories, a administrative expense and the like, is that what you are saying?

A. The Commission sends a staff in to the company of possibly four men, and they spend four or five weeks reviewing the expenses which are stated on the books of the company for the test period that we are using as, using for the rate case. So they review all of the expenses on our books. So it is — I believe you said the general accounts of the company are reviewed — yes.

Q. In paragraph nine of your affidavit, you indicate that never has the Michigan Public Service Commission determined the lamp exchange program was either unreasonable or otherwise unlawful.

(59)

Do you know of any specific determination of the Michigan Public Service Commission determining that the lamp exchange program was reasonable?

A. I guess by the fact that they have approved our rates while they excluded certain expenses, is just, is, in my understanding their approval that the lamp exchange program is reasonable.

Q. And similarly, would you say with regard to the question as to whether or not it was lawful?

A. I would also say that their approval of the rates indicates that it is lawful.

Q. But they have never in any written document that you know of used any of the terms "reasonable", "unreasonable", "lawful", or "unlawful" in connection with the lamp exchange program?

A. I am not —

MR. COHEN: I am going to object to the way the question is asked, and I want to state the nature of my objection, because — I don't mean it to be disruptive — but when you say as to the nature of the program, if you are talking about the nature of the program, as such, I understand your question. If you are talking about the nature of the program generally, I think he has testified when they approve the tariffs that we file that include our description of the

lamp supply program, there is a hearing, (60) and if the entire tariff is specifically approved, they have indeed found the lamp supply program as it is included in the tariff is both lawful and reasonable.

Now, if your question is whether they have ever separately found that the lamp supply program, as such, is —

MR. NELSON: That is the question.

Q. (By Mr. Nelson): Have they ever separately found the lamp supply program, as such, is either reasonable or lawful?

A. Completely by itself, I am not aware of such a finding.

As a part of the various domestic space heating and general service rates, by their approval of the specific rate sheet, I believe them to be designating that they, the practice is reasonable and lawful. They have not used the words.

Q. Then your, the statement, the statement in paragraph nine of your affidavit, then, is based upon your belief, is that correct?

A. It is based upon the approval of the Commission of these —

Q. And your belief as to what that means, is that correct?

MR. COHEN: I am going to object to that question as being argumentative; it is based upon the ruling of the Commission.

MR. NELSON: He did not say that, (61) Mr. Cohen. He said that this was his belief.

Q. (By Mr. Nelson): Is that true, witness?

MR. COHEN: Let us have the question back.

(Question and answer read.)

MR. COHEN: What does paragraph nine read in your affidavit?

A. Paragraph nine —

MR. NELSON: I shall read paragraph nine for the record. That never has the Michigan Public Service Commission determined that the lamp exchange program was either unreasonable or otherwise unlawful.

MR. COHEN: He has stated positively that they have

never done that. It is not a question of his belief of paragraph nine; he answered that one specifically.

Q. (By Mr. Nelson): And, I guess, to straighten this out, we will withdraw the last question, and ask again if you know of any order, document, given to Detroit Edison by the Commission in which they state that the program is reasonable, unreasonable, lawful or unlawful?

A. Those specific words?

Q. Yes.

A. No, I am not aware of any of those specific words.

(62)

Q. And isn't it a fact that in your rate cases that are submitted to the Commission with these various rate sheets that are now Exhibit 4, are considered, they deal, really, with just volumes of, of accounting data and information that you prepare for the Commission in order to justify a rate change? That is true, is it not?

A. Volumes can be anything from what is on the table to a roomful. I cannot answer the question in that manner.

Q. All right. Is it a roomful?

A. No.

Q. Certainly, it is a rather complex hearing, is it not?

A. Hearings are complex, yes.

Q. Involving all of your costs across the full gamut of what Edison does?

A. Very complete reviews are made of the operation of the company, and the staff of the Commission provides an audit which indicates the reasonableness of the expenses and revenues of the company.

Q. So that those audits that you are talking about are general audits that reach actually into all facets of your operation, is that not true?

A. The audits are very wide ranged in their nature.

Q. You are not suggesting to us or to the court through this affidavit, that the Commission has specifically come here and (63) reviewed only the lamp bulb program, are you?

A. No, I have not —

Q. And you are not suggesting by your answers here that the Michigan Public Service Commission has come in here and reviewed or audited only the lamp bulb program?

A. No, sir.

Q. That has never happened, has it?

A. Not to my knowledge.

MR. NELSON: Do you have anything further?

MR. SKLAR: Just a couple.

RE-CROSS EXAMINATION
By Mr. Sklar:

Q. From what I understand, Mr. Daniels, from what went on early this afternoon, whatever data has been submitted to the Michigan Public Service Commission with respect to the light bulb program is financial data dealing with cost?

A. To my knowledge, that is the data that has been provided, yes.

Q. So that if the Michigan Public Service Commission has reviewed anything about the program, assuming they have reviewed something about the program, it would be the costs or expenses relating to the program?

A. At the time of their audit, I am not entirely sure how much they may have discussed with the marketing or the — mostly (63a) marketing, but, possibly purchasing, other aspects, so —

Q. But as far as you know.

A. My knowledge would be only in the financial area.

Q. Okay. So that you do not have knowledge, do you — strike that one.

So you can only testify from your own knowledge they have reviewed the cost of the program, if they have reviewed anything?

A. Yes. Yes.

Q. Okay. Would it be a more accurate statement of your assertion in paragraph eight of your affidavit, that on many occasions the Michigan Public Service Commission has reviewed the cost of Detroit Edison's customer service programs, including, among others, the lamp exchange

program and the appliance program? Would that be a more accurate statement than the one that is there?

MR. COHEN: For the record, at this point, would you read the one that is there, number eight.

A. That on many occasions the Michigan Public Service Commission has reviewed Detroit Edison's customer service programs, including, among others, the lamp exchange program and the appliance repair program.

I don't think that I can say just the costs, because I am —

(64)

Q. (By Mr. Sklar): I am only saying insofar as your knowledge is concerned, your affidavit?

A. Well, I guess on the appliance repair program, because I have just gone through the rate case, I am aware that — I guess the costs —

Q. May I make a suggestion. And the suggestion is — I am sorry. Is the "yes" an answer to my previous question?

MR. COHEN: He has not answered your previous question.

Q. (By Mr. Sklar): I was going to make a suggestion that we eliminate reference, in my hypothetical statement, to the appliance program, and looking at your paragraph eight only as it relates to the lamp exchange program.

A. Okay. Under the lamp exchange program, it would be the financial costs relating to it.

Q. That would be a more accurate statement?

A. Just on, just in relationship to the lamp exchange program.

Q. Okay. Now, and it is also my understanding that you, you base your opinion that the Michigan Public Service Commission has reviewed the cost of the lamp exchange program upon what you know to be the submissions to the Michigan Public Service Commission and what you know to be their procedures, their internal procedures, as well as your, the observable fact they have come down here and, and (65) audited your expense accounts?

A. For rate case purposes.

Q. Okay. And that is the basis upon which you came to the conclusion they have reviewed the cost of the lamp exchange program, is that correct?

A. Yes, sir.

Q. Okay. Approximately how long does a rate proceeding take from the time that you file, from the time that you initiate the proceeding, until you complete the testimony of the hearings?

A. They are varying lengths of time. The shortest case that we have had was a seven month case. The longest one was approximately twenty-one months.

Q. Okay. That is not a five day a week, nine to five deal, consecutive days, is it?

A. No, sir.

Q. Okay. But when a rate case is in process, it does consume a great deal of time and effort, I would assume, of the department which you head?

A. There are certainly peaks and valleys as far as the time spent on rate cases.

Q. Okay. Would it be fair to characterize you as the, the principal orchestrator of how the, the company's evidence gets presented to the Commission?

(66)

A. I guess I would have to say that the, there is a matter of policy in determining the method in which we will present various exhibits and who the, the witnesses would be. I would have recommendations to that selection, but I cannot say that I would have a final decision on how to present a case.

Q. But once that decision is made as to presentation, would you be responsible for seeing that it is carried out?

A. A large portion, I would have a direct responsibility. The — it would be shared. I would not have the entire responsibility.

Q. Okay. This may be going over ground we have covered before, but just very quickly. The spread sheet, which is Exhibit No. 3, I understand, was part of a much larger

batch of documentary information submitted to the Commission, to the Michigan Public Service Commission.

A. Yes, sir.

Q. In response to their request for more detailed data with respect to expenses, is that not correct?

A. It is a, in response to the, the requirement to properly back up your exhibits, and so it — yes, the requirement is that the work papers that support the exhibits must be submitted.

Q. Okay. Was that a comment offered by the Michigan Public (67) Service Commission as to this particular portion of that submission by this particular portion? I am referring to all of Exhibit 3.

A. I don't think it was a comment on that specific portion. It was more a part of their rules which were promulgated this past year, last December, that required work papers to be submitted with the case and thereby a full explanation.

Q. Okay. Now, I think you alluded to the fact that a good part of the hearings before the Michigan Public Service Commission are taken up with objections by various intervenors and other witnesses to the inclusion of expenses and to the inclusion of certain items in the rate base for purposes of calculating your return. Is that correct? You did make that statement, I think, before.

A. I made the statement that the, the hearings are involved. The adjustments to the, the book, income statement, and that the company submits a number of adjustments which are cross-examined by both the staff of the Commission and the intervenors. Then the Commission staff and all interested intervenors submit adjustments that they feel are appropriate, and they are cross-examined by the other parties.

I don't know that I, I indicated a time span, but it is a good portion of it.

Q. Okay. And is it true that as a result of objections and (68) the statements of intervenors, that items are excluded from time to time, of expense?

A. There are items that have been judged to be unallowable by the Michigan Public Service Commission.

Q. Okay. And I gather from what you said, the Public Service Commission will initiate questions itself of expense items in addition to having questions raised by members of the public appearing as witnesses?

A. The Public Service Commission, as either the examiner or the — in the first case, the Commissioners sat on the bench, and from time to time would ask questions for clarification or for, I guess, additional information.

Q. Okay. And to your knowledge, has any member of the public in the way of an intervenor, or a member of the Commission, raised a question concerning the expense item included specifically in your book statement, as you said, reflecting the expense of the light bulb program?

A. No, sir.

Q. Okay. This is a question that is kind of in the form of a statement. I just want to see that I understand these various financial data, and correct me if I am wrong. I suppose I should say is it correct that the only item of expense relating to the light bulb exchange program which has been specifically identified in any filing made with the (69) Michigan Public Service Commission, is the cost of purchasing lights, light bulbs, from the various suppliers, that additional expenses relating to the light bulb program but which are not allocated to the light bulb program may be, and are, some portion of labor expense, land expense, taxes, heat, light, insurance, and similar operating expenses in connection with the service centers, that neither, that none of those expenses —

MR. COHEN: I don't mean to cut you off, but could we break it down into three parts. It is so long. Get the answer to the first part, and the second question and his answer, and the —

A. I agree, it is very long.

Q. (By Mr. Sklar): The first part, is that a correct statement? The only identifiable expense tied directly to the light bulb exchange program submitted to the Commission is the cost of purchasing light bulbs from the suppliers?

A. Direct assignment?

Q. Yes.

A. Direct assignment is only the light bulb expense.

Q. Okay. That there is some, the second part of my question-statement, is that there are some additional expenses incurred by Detroit Edison that are in generally accepted accounting principle terms allocable to the light bulb program and that (70) these would be, for example, part of the cost of operating the service centers where light bulbs are exchanged, some part of advertising and sales promotion, and some part of administrative expenses within the company?

A. The expenses that are included in the administrative in general accounts are allocated to the program, in addition to some of the marketing labor that is associated with the program. That is allocated, too.

Q. But they have not been allocated on any filing submitted to the Michigan Public Service Commission?

A. There is an allocation in that Exhibit 3 that shows that.

Q. Okay. But prior to that, there has not been, to your knowledge?

A. Prior, that is right. That has not been submitted to the Michigan Public Service Commission.

Q. The third part of my question is that there are certain capital improvements — strike that.

The third part of my statement is that the rate base in the applications of good accounting practices might be reasonably viewed as being investments made to support the light bulb program upon which, to support the light bulb program, and that these would include some portion of the cost of service centers, some portion of the working capital aspect of the rate base, that forty-five day (71) working capital, and some portion of, of general building and office supplies, and the like, in corporate headquarters that have to be used in some way in connection with the light bulb program. Is that a fair statement?

A. Could I have that read back.

(Question read.)

MR. SKLAR: Strike that question.

Q. (By Mr. Sklar): Isn't it true that the capital investment of the company upon which a return is sought, which

is used as a basis for establishing a rate, includes some of the, includes certain investment in service centers and certain investment in equipment and furniture and fixtures in the general offices which might properly be attributable to the light bulb exchange program, and that in addition the rate base includes a factor of working capital, forty-five days of working capital, part of which is used to, is set aside in anticipation of costs relating to the light bulb program?

A. I guess I cannot agree with that. I don't agree with that.

Q. You don't?

A. No.

Q. Let us identify what portions you disagree with. Do you disagree that part of the investment in service centers must, in application of good accounting practices, be allocated to support the light bulb program?

(72)

A. I would disagree with that in the context that the elimination of the program won't change the, the investment at those locations.

Q. Is that a statement of fact or an opinion on your part?

A. That is an opinion. I don't — I am not positively sure that there would be absolutely no change. It is more — it is an opinion.

Q. Okay. Do you disagree with that part of my statement that one of the investments in furniture, fixtures and equipment in the general offices in the application of good accounting practices must be viewed as incurred to help support the light bulb exchange program?

A. Yes, I do.

Q. Okay. And do you agree with that portion of my statement that the working capital portion of the rate base also includes funds which, or funds which are anticipated, which are anticipated will be used to support the light bulb program?

A. There is a small amount of funds in the working capital.

MR. SKLAR: Okay. I have no other questions.

MR. NELSON: We are going to go back on this tomorrow, anyway, I take it?

MR. COHEN: We can finish it up.

(73)

MR. NELSON: I have no questions at this time.

CROSS EXAMINATION
By Mr. Cohen:

Q. Is it my understanding that in 1964 Detroit Edison asked the Michigan Public Service Commission for permission to reduce its rates?

A. Yes, sir.

Q. And that as part of their submission, they asked permission to drop, or at least modify a program under which certain commercial users of the light bulb program had the option either to pay a rate which involved free exchange of light bulbs, or pay a lesser rate and not get the free exchange of light bulbs?

A. Yes, sir.

Q. And the Detroit Edison specifically asked the Michigan Public Service Commission for permission to remove the option aspect of that rate?

A. Yes, sir.

Q. And did the Michigan Public Service Commission specifically give Detroit Edison permission to make that particular change in their light bulb program?

A. They specifically ordered the company to make that change.

Q. And was that after a hearing?

A. It was not a formal hearing, but it was a hearing before (74) the — the members of the Public Service Commission were presented the information, and then issued the order eliminating that option.

Q. Now, in Defendant's, or Plaintiff's —

MR. COHEN: Off the record.

(Discussion off the record.)

Q. (By Mr. Cohen): Now, on Plaintiff's Exhibit 4, the third page is entitled "Domestic Service Rate". At the top, it states M.P.S.C. number 7. At the bottom it states issued: August 19, 1972. Do you have that before you?

A. Yes.

Q. This domestic service rate includes, reading down the left hand side: availability of service; hours of service; current, phase and voltage; rate per month; discount; minimum charge; lamp supply; contract term; water heating service, is that correct?

A. Yes, sir.

Q. Is it a fair statement, then, that when you, in fact, are filing for a rate or a change in a rate, that the term "rate" includes the kind and availability and hours and other aspects of service which you desire to furnish your customers, in this case the domestic customers, pursuant to a specific rate schedule?

A. Yes, sir.

(75)

Q. So that a rate hearing is something more than, something more than just to determine specific rates; it does, in fact, determine the rules and regulations under which Edison must provide service pursuant to specific rates, is that correct?

MR. SKLAR: I will object to that question because I think that is asking for a legal conclusion. I think it is argumentative.

Q. (By Mr. Cohen): He made his objection. Would you answer the question, please. Is that correct?

A. That is correct.

MR. SKLAR: And I want to move, also, the question and the answer be stricken on the record.

MR. COHEN: I think for purposes of the record, that the, that any objection to a question, or any objection to a question I make, or you make, I think we can stipulate reserves that question for the right at a later time to strike should it be presented at the trial.

MR. SKLAR: Okay.

MR. COHEN: I think we should go farther. The failure to object to a question also does not mean any consent to the form of the question involved.

MR. SKLAR: Okay.

Q. (By Mr. Cohen): Now, on that same sheet —

MR. SKLAR: Jerry, let me say this on (76) that last point. I think it is a rule in the Federal Courts all over, not just here — I know in Chicago in the Northern District of Illinois, there is no such thing as a discovery deposition; that all depositions can be used for evidentiary purposes, if the witness is not available.

MR. COHEN: Right, if the witness is not available.

MR. SKLAR: So, consequently, if there are objections to questions, I suppose the objection can be raised at the time —

MR. COHEN: Let me say, this is an important question, because your right to ask questions on discovery is quite different from your right to ask questions during the course of a trial.

MR. SKLAR: Yes, that is true.

MR. COHEN: And that is why I have always assumed, and I think correctly, you may always object to any question and answer in a deposition when that deposition is intended to be used at a trial as a substitute for the witness himself.

MR. SKLAR: Right.

MR. COHEN: Because the rules of, the rules are different.

MR. SKLAR: All right. I see. I see.

(77)

MR. COHEN: In other words, I have specific —

MR. SKLAR: Yes. I see. You are correct.

MR. COHEN: You are entitled here to explore anything relevant to the proceedings or that would lead to something that would be significant.

MR. SKLAR: That is right. You can raise the objection. If a deposition under the rules is going to be offered as evidence, and under the rules can be admitted into evidence, that you have a right to object to specific questions

and answers at the time of the pro-offer of the deposition, without our even stipulating to it.

Q. (By Mr. Cohen): Now, on the right hand side in the bottom of this same sheet it states: Effective on service rendered on and after August 19, 1972 under authority of order of the Michigan Public Service Commission, dated August 18, 1972, in case U-3910.

A. Yes, sir.

Q. And are you aware that, in fact, there was an order issued by the Commission in regard to this particular proceeding?

A. I am aware of the order.

Q. Now, B-5.5 states: Lamp supply. I am sorry. Strike that.

Under lamp supply on domestic service (78) rate I just read from in the M. P. S. C. number seven, it states: See schedule designation B-5.5. Is that correct?

A. Yes, sir.

Q. Turning back to the first page, which states "original sheet number B5, M. P. S. C. number seven?

A. Yes.

Q. Under rules and regulations — continued. Do you see that?

A. Yes.

Q. There is stated: B-5.5. Lamp supply: Incandescent lamps will be furnished without extra charge:

1 To residences connected for the first time to the company's lines, in such quantities as may be needed for all permanent fixtures.

2 As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under the applicable rate.

Do you see that?

A. Yes.

Q. And, apparently, according to the notation on the right hand side bottom, these rules and regulations were

approved under authority of an order of the Public Service Commission, is that correct?

A. Yes, sir.

Q. Now, as a matter of fact, any change that you desire to make (79) in rules and regulations that have been adopted only after an order of the Commission must, in fact, be presented to the Commission for permission to make that change, isn't that correct?

A. Yes, sir.

Q. And the Commission must give specific authority, and issue an order approving a change in any of these rules and regulations before Edison can, in fact, change them, is that correct?

A. Yes, sir.

MR. SKLAR: May I see that.

Q. (By Mr. Cohen): And isn't it also true in the hearings in which, that in the petitions you have filed, and since 1947, with the possible exception of the 1965 request, all of your so-called rate filings included changes you desired in the rules and regulations under which you were operating, is that a correct statement?

A. All rate filings were requests for some change to the rules, rates, rules and regulations. It was a change that was taking place.

Q. And in all of those hearings, with the possible exception of 19 — in all of those applications, with the possible exception of 1964, the Commission held an actual hearing on your application, is that correct?

(80)

A. No, it isn't completely correct, because there are changes which are made upon a, a meeting of the Commission, and after they have determined whether there is an effect on a customer or not, they then determine whether a physical hearing must be held other than their normal Commission meetings. It is possible for the Commission to issue an order without formal hearing. But it does require a Commission meeting before they can issue that order.

Q. Well, is it possible for the Commission to change a

rate or a rule and regulation affecting the conditions of domestic or commercial service without a meeting and an order?

A. No, sir.

Q. And since 1946, there has, in fact, been changes made in the specification of your lamp supply program as approved by the Commission, is that correct?

A. Would you expand on that. You say specification. If you mean the change in the option and things of that nature — ?

Q. I am talking about the change of the option and such changes as the number of bulbs that may not be exceeded in a single residence, for instance.

A. The option was certainly changed in '64, and there is reference, change in reference to the number of lamps to any one residence. That has occurred in that period of time.

Q. Well then, is it not an accurate statement that on many (81) occasions, as you set forth in section, in paragraph eight of your affidavit, that the Public Service Commission has reviewed Detroit Edison's customer service programs, including, among others, the lamp exchange program and the appliance repair program?

A. From the rate sheets, the changes that have occurred on the rate sheets, yes.

MR. COHEN: I have no further questions.

MR. SKLAR: May I see that exhibit?

RE-CROSS EXAMINATION
By Mr. Sklar:

Q. Mr. Daniels, these rate sheets are — it says issued by R. W. Hartwell, Executive Vice-President for Finance. Are these printed by Detroit Edison, or are these printed in, by the Commission?

A. The rate sheets are printed by Detroit Edison after the company receives an order which is attached the specific rate sheets, or the, a rate sheet. We are then directed to print the rate sheets and file them with the Commission for their concurrence that we, we have followed their order,

and you will notice that on each sheet is a stamp of the Commission on which it was filed.

Q. Yes. I see that. These are not the rate sheets that are in this form filed at the commencement of a rate proceedings, (82) then, are they?

A. They are basically in the same form, but they —

Q. Do you have copies of the forms that are submitted at the time a rate proceeding commences?

A. I have them in my office. I don't have any right here.

Q. My only question is, of course, that the deposition asks for what was submitted, or, rather, the interrogatories. I would like an opportunity to look at those, tomorrow morning.

A. Certainly.

MR. COHEN: It is my understanding that you submit a proposed rate sheet and proposed rules and regulations to the Commission almost in the form of a tariff, is that correct?

A. Yes, sir. It looks like this, except maybe those bottom parts, the issue and the executive date would be blocked out. But, otherwise, it would be the same thing.

MR. COHEN: And then if the Commission, after they have met, issues an order adopting, or after, after a hearing, issues an order adopting the rate sheet and the rules, the rules and regulations to which they refer, as you filed them with the Commission, if that is approved by the Commission, then you proceed to send copies, new copies to the Commission?

(83)

A. No. They attached the, really, copies of our submission, if they have approved it in whole. Otherwise, they may attach a copy of something that has had a, a rule has been replaced or changed in there by their direction.

MR. COHEN: If that is done, then you reprint those particular pages, is that correct?

A. Yes.

MR. COHEN: And resubmit them to the Commission?

A. Then we submit them to the Commission for filing and for concurrence that we followed their order.

Q. (By Mr. Sklar): So there is no material difference between what you start out with and what you end up with?
A. If they agree.
Q. Once the Commission changes it, the only difference is this at the bottom and the "filed" statement?
A. Yes. Right.
MR. COHEN: That's right.
MR. SKLAR: Off the record for just a second.
(Discussion off the record.)
MR. SKLAR: That's all.
MR. COHEN: Thank you very much, Mr. Daniels.
(Deposition concluded.)

• • •

Deposition of George L. Lahodny

• • •

(4)

GEORGE L. LAHODNY, called as a witness for cross-examination under the Federal Rules of Civil Procedure, being duly sworn by the Notary Public, was examined, and testified as follows:

• • •

CROSS EXAMINATION
By Mr. Sklar:

Q. Would you state your name, sir.
A. George L. Lahodny.
Q. And where do you reside, Mr. Lahodny?
A. Marine City, Michigan.
Q. And the exact address?
A. 6747 Meisner Road.

Q. Okay. And you are employed by the Detroit Edison Company, (5) are you not?
A. Yes, sir.
Q. And you are an officer of that company?
A. Yes, sir.
Q. And what office do you hold?
A. Executive Vice-President for customer and marketing services.

• • •

(9)

Q. (By Mr. Sklar): Is it your understanding, Mr. Lahodny, that the light bulbs which are distributed to Detroit Edison's customers in the light bulb program are exchanged or are sold?
A. Exchanged.
Q. I see. And what are they exchanged for?
A. A burned out light bulb.
Q. And what happens to the burned out light bulbs?
A. Just destroyed and put in the rubbish.
Q. I see. There is no value assigned to those burned out light bulbs?
A. No.
Q. When they are received?
A. No, sir.
Q. Do you have anything directly to do with the preparation of rate sheets which are submitted to the Michigan Public (10) Service Commission?
A. No, I do not.

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(11)

Q. (By Mr. Sklar): Do you have any knowledge or recollection, Mr. Lahodny, that Detroit Edison at any time has promoted or advertised its lamps as being free?
A. Yes, we have.
Q. Can you specifically indicate from your recollection when that might have been?
A. When it might have been?
Q. Yes.

A. I haven't checked that.
Q. Okay.
A. If you are looking for dates, I would have to check it.
Q. Yes. Or approximate dates or times.
A. I can't — I don't know.
Q. Okay. To your knowledge, is there — is it doing so now?
A. Pardon?
Q. Is it doing so now?
A. No, sir.
Q. It is not.
A. Except in our customers' offices where the customers come in to exchange light bulbs.
Q. I see. And what happens there?
A. They have a placard that indicates the size of the bulb for exchange.

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(14)

Q. So that for, you believe, that for, from approximately September, '73, until the current time, no similar letter is going out from Detroit Edison?
A. Sometime prior to that, we discontinued it, prior to September, in anticipation of a Commission order.
Q. Okay. Are you the author of this letter? Did you write this letter, or did someone else?
A. I had something put into it, but —
Q. Well, did you write this sentence here which is in the letter: Enclosed is some information about Edison services. You will note that we exchange burned out incandescent light bulbs and some appliance cords on a no charge basis?
A. No, I did not write that.
Q. Do you know who wrote that?
A. I imagine our customer relations group.
Q. Anyone in particular who might be, that you might have in mind who might have been the author of that statement?
A. No. There is four or five people that prepare material like this.

Q. In your opinion, is that a correct and accurate statement?
A. Yes.
Q. There is no charge — ?
A. For burned out light bulbs on an exchange basis.
Q. Okay. Even though you indicated earlier that, that Edison (15) somehow recovers its cost and that recovery is included in the rate?
A. That's right.
Q. Is it — what you mean, there is no charge imposed at the time they pick up the light bulbs?
A. At the time of transaction.
Q. But there is a charge at some other point in time, and that is included in the rate?
A. Part of the rate structure.
Q. Okay. Do you know whether the new letter which is being prepared in place of this letter includes the same or similar statement concerning the no charge availability of light bulbs?
A. I don't know. I would have to look and see. I am sure it does, but I am not certain.
Q. Okay.
A. I mean, I am not sure. I think it is, but I am not certain.
Q. Okay. Do you know whether — strike that question.
MR. SKLAR: Would you mark this as No. 7.

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(21)

Q. Okay. To your knowledge, Mr. Lahodny, has either Plaintiff's Deposition Exhibit 6, including the attachments of Plaintiff's Deposition Exhibit 6, which I would ask you (22) to look at before you answer the question —
A. Yes.
Q. — and Deposition Exhibit 7, ever been submitted to the Michigan Public Service Commission in connection with any proceeding before them?
A. I don't know.

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(34)

CROSS EXAMINATION
By Mr. Holstein:

Q. Mr. Lahodny, referring to Exhibit 4 attached to Defendant's answer to Plaintiff's first set of written interrogatories, being captioned "Customer relations routine instruction" —

A. Is that the one I looked at earlier?

MR. SKLAR: Yes.

Q. (By Mr. Holstein): Were those instructions ever submitted to the Michigan Public Service Commission or any of its predecessors?

A. I don't know.

(35)

Q. Did anybody from the customer relations department in market services ever request that that information be submitted to the Michigan Public Service Commission?

A. Not to my knowledge.

Q. Did anybody from marketing or the public relations department of the company feel any need to submit that to the Michigan Public Service Commission for approval?

A. I don't know.

Q. May I have it back, please.

A. Sure.

Q. Would you look this document over, sir; and have you had an opportunity to familiarize yourself with the total contents of it?

Now, with regard to the contents of the document, is there any item contained therein ever submitted to the Michigan Public Service Commission or any of its predecessors?

A. I don't know.

Q. Has anybody from marketing services or customer relations ever suggested that any of the contents of that document be submitted to the Michigan Public Service Commission?

A. I don't know.

Q. May I have it back, please.

A. Yes.

(36)

Q. Did the Michigan Public Service Commission or any of its predecessors ever request any information that might be contained in this document?

A. I don't know that, either.

Q. What filings do the customer service relations department and/or the marketing department of Edison, submit to the Federal Power Commission?

A. I don't know. That is usually coordinated by someone else in the company.

Q. Who does that?

A. The financial area.

Q. Who in the financial area would be the best one to talk to about that?

A. I imagine Ron Daniels. I don't know.

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(41)

Q. Referring to Exhibit 8, which includes the survey on use of (42) customer offices, market analysis made in 1970, has the information contained in this document ever been submitted to the Michigan Public Service Commission?

A. Not to my knowledge, no.

Q. Has anyone from the company ever suggested that it be submitted to the Public Service Commission?

A. Not to my knowledge.

Q. Has the Michigan Public Service Commission ever requested that such a survey be made?

A. No.

Q. Has the Public Service Commission ever asked for any of the information contained in that survey?

A. Not to my knowledge, no.

MR. SKLAR: Off the record.

(Discussion off the record.)

(Whereupon a document was marked Plaintiff's Deposition Exhibit No. 9 by the Reporter.)

Q. (By Mr. Holstein): Mr. Lahodny, would you please look at Exhibit No. 9 for identification.

A. Yes, sir.

Q. This document is an excerpt from a much larger document, is it not?

A. Yes, it is.

Q. And I take it that that document is entitled "The Detroit (43) Edison Company, economic analysis", and the portion that has been marked Exhibit 9, is that part of the economic analysis that deals with the light bulb program?

A. Right, sir.

Q. To your knowledge, was there anything else contained in that economic analysis dealing with the light bulb program?

A. No, it has not.

Q. Do you recall who — strike that.

The economic analysis was made upon, among other things, a customer survey, was it not?

A. Yes.

Q. That survey was conducted by Central Surveys, Inc., of Shenandoah, Iowa?

A. That's right.

Q. Who chose that survey company to make the survey?

A. The contractor who made the economic analysis for us.

Q. Do you have any reason to doubt the reliability of Middle West Service Company, apparently the company who made the economic analysis?

A. No, I do not.

Q. Do you have any reason to doubt the reliability of the company chosen to make the survey, Central Surveys, Inc., of Shenandoah, Iowa?

A. No, I do not.

(44)

Q. Do you have any reason to doubt the reliability of that portion of the economic analysis set forth in Exhibit 9?

A. No.

Q. Do you know what questions were asked in a survey with regard to the use of the light bulb program?

A. Only as it appears in that document there.

Q. Do you know whether or not the survey taken in January of 1955 categorized the light bulb program as free?

A. No, I don't. I cannot answer that. I don't know.

Q. The economic analysis made in 1955, and that portion of it that had been given to us and marked as Exhibit No. 9 was retained by the company as part of its business records, is it not?

A. Yes.

Q. Do you know whether or not the contents of the Exhibit 9 was ever submitted to the Michigan Public Service Commission, or the Federal Power Commission?

A. I don't know.

Q. Do you know whether or not the contents of Exhibit 9, or any part thereof, was ever requested by the Federal Power Commission, or the Michigan Public Service Commission?

A. I don't know that.

Q. Do you know whether or not any information of the kind set forth in Exhibit 9 was ever submitted to the Michigan Public (45) Service Commission or any of its predecessors?

A. I don't know.

Q. Do you know whether the Michigan Public Service Commission or any of its predecessors ever requested any information of the kind set forth in Exhibit 9?

A. I don't know that.

Q. Sir, when was the decision made by the Edison Company to provide a longer life bulb as part of its bulb program, as opposed to the standard marketed bulb?

A. I would say within the last ten years or so.

Q. Would it be subsequent to this survey?

A. I believe it was.

Q. What was the reason for deciding to provide a longer life bulb?

A. I believe there were two reasons. First, for customer convenience: They did not have to come in as often as they would have if they had a shorter lamp life. And,

number two, we were not required to handle the same volume of lamps that we would have had we had the shorter lamp life.

Q. What others?

A. I believe that was about it.

Q. Do you know whether or not there was an increased price for longer life bulbs?

A. I believe there was.

(46)

Q. Do you know what the increment increase was?

A. No, I don't.

Q. Who would know that?

A. I believe Mr. Milby would.

Q. Mr. Lahodny, has anybody from your department, the marketing department of the customer relations department of this company, have anything to do with the Michigan Public Service Commission?

A. No, sir, except that we are called on as a witness.

Q. And when was the last time that anybody from either of those departments was called upon as a witness?

A. Within the last seven or eight months.

Q. And for what purpose?

A. Our collection practices.

Q. Prior to that, when was the last time anyone from either of those departments were called upon as a witness for the Michigan Public Service Commission?

A. I cannot give you the exact date. But we have been called on from time to time to serve as witnesses regarding certain practices which were under study by the Commission.

Q. Has anyone from the marketing department or public relations, customer relations department, ever been called upon as a witness with regard to anything relating to the light bulb program?

(47)

A. Not to my knowledge.

Q. Would the same answers be true with regard to the Federal Power Commission?

A. Yes.

Q. Has anybody from the marketing department, or the customer relations department, ever been called upon as a witness before the Federal Power Commission?

A. I would say no.

Q. Who handles the — strike that.

MR. HOLSTEIN: Anything else?

(Discussion off the record.)

Q. (By Mr. Holstein): Mr. Lahodny, with regard to the agents of the Edison Company, could you explain for us how they are compensated concerning the bulb exchange program?

A. Yes. They are compensated by transaction, depending on the transaction. In other words, they get so much for a bill payment and so much for an appliance repair, if they take it in for repair, so much for a lamp exchange.

Q. How much do they get for lamp exchange?

A. I don't know. The last I knew it was fifteen cents, but it might have been changed since then.

Q. In other words, it was fifteen cents for any — ?

A. Every transaction. Every lamp exchange transaction.

Q. By that you mean it has nothing to do with number of bulbs (48) that were provided?

A. No. It was a transaction, just as a bill payment.

Q. Has that policy of compensating the agents always been, always been in effect, to your knowledge?

A. Yes, it was.

Q. Does Detroit Edison Company have a certificate of convenience and necessity granted by the Michigan Public Service Commission?

A. What do you mean, convenience and necessity? What is your definition of that? And for what? I mean, we have convenience and necessity for generation, for example, et cetera, et cetera. So this can hit the gamut of the industry. So you have to qualify your question as to what area you are referring to and to its content, so I can intelligently answer the question.

Q. Does it have a certificate of convenience and necessity furnished by the Michigan Public Service Commission to sell electric energy?

A. We have a franchise in the community that we serve to sell electricity.

Q. You did not answer my question.

MR. HOLSTEIN: Would you read the question back.

(Question read.)

(49)

MR. COHEN: I am going to object to the question as worded, because —

A. I frankly do not know what you mean.

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Deposition of William R. Milby

• • •

(4)

WILLIAM R. MILBY, called as a witness for cross-examination under the Federal Rules of Civil Procedure, being duly sworn by the Notary Public, was examined, and testified as follows:

CROSS EXAMINATION
By Mr. Holstein:

Q. Would you please state your name.

A. William R. Milby.

Q. Your address, sir.

A. 30512 Jefferson, St. Clair Shores, Michigan.

Q. You are employed with the Detroit Edison Company, are you?

A. That's right.

Q. What position do you currently hold?

A. Assistant vice-president and manager of customer services.

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(9)

Q. And what was discussed with regard to the value of the program (10) — strike that.

What was discussed with regard to the value — strike that.

What was discussed with regard to the cost of the program to the customer?

A. Well, as we have said, the, the amount of money we spent for lamps was, say, two million, two million two, in that range. Now, if this is a cost which is included with all of our other costs, and we — I think weighed this against customer benefits for that amount of money.

MR. HOLSTEIN: Would you read back my question, Mr. Reporter.

(Question read.)

MR. HOLSTEIN: I move that the answer be stricken as not responsive.

Q. (By Mr. Holstein): I ask again, Mr. Milby, what was discussed with regard to the cost of the program to the customer?

MR. COHEN: He has testified there was something discussed with regard to the cost to the customer.

Q. (By Mr. Holstein): Yes?

A. I think I discussed, or mentioned it a little differently. I think I said the benefits to the customer, but —

Q. You said the benefits to the customer. You also said the (11) cost to the customer was discussed.

A. Well, the benefits versus the cost of the program, yes.

Q. To the customer? Again I ask the question. What was discussed with regard to the costs of the program to the customer?

A. Could you make it a little clearer. I thought I answered it before.

Q. You discussed the benefits of the program to the customer. Now I want to know what was discussed with regard to the costs.

MR. COHEN: If anything.

A. Well, he does not have a direct cost, but it is certainly in our cost of doing business, which are eventually reflected in the rates.

MR. COHEN: What he is asking you is what you recall of a discussion. He has not asked you what your opinions were. He is asking — you testified, I believe, that you had occasional meetings and there was a discussion. Now he is asking you what if anything you recall of that discussion.

A. Well then, I would have to say I don't remember.

Q. (By Mr. Holstein): Well, I think you already testified that you discussed, among other things, the value of the program from a customer relations standpoint, the benefits of the (12) program in regard to the customer, and also the costs to both Edison and the customer. Isn't that what you said you discussed?

A. I don't recall what I, whether I said that. I think I said we discussed the costs in relation, in relation to the benefits, and I meant the customer, or company costs in relation to the customer benefits.

• • •

(13)

Q. (By Mr. Holstein): Was the question of the costs to the customer of the light bulb program ever discussed by the customer policy committee, since you have been on it?

A. To the best of my recollection, I would say the answer is no, I did not.

Q. It is of no consideration — strike that.

It is of no consideration to the customer policy committee what the costs of the program are to the customer?

A. In the context of what you are asking, we do consider what he would pay, for instance, for the light bulb if we did not have to program it.

Q. Do you also consider what the customer has to pay for the bulbs, since you do have the program?

A. We know what he has to pay for them under that.

It is part of our total cost of doing business. The same as buying transformers, buying wire, buying cable.

Q. Do you know what they are? Do you ever discuss them?

A. Yes, we know what they are.

Q. I move that be stricken as not responsive.

(14)

Do you ever discuss the costs to the customer?

A. I don't recall —

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(19)

Q. (By Mr. Holstein): Page two sets forth under twenty-five watt bulbs, renewal charge free; forty watt bulbs, renewal charge free; sixty watt bulbs, renewal charge free; (20) one hundred watt bulbs, renewal charge free, one hundred fifty watt bulbs, renewal charge free, two hundred watt bulbs, renewal charge free; three hundred watt bulbs, renewal charge free.

MR. HOLSTEIN: Now, read back the first question.

(Prior questions, answers and colloquy read.)

A. Let me see if I understand the question. You are saying, have we always used the word "free"?

Q. (By Mr. Holstein): Yes.

A. The answer is no.

Q. What other language did you use to describe cost of the bulbs to the customer?

A. We have used "at no extra charge", and we have used "At no charge".

Q. You are currently using "At no charge", is that correct?

A. The last letter we had was, used "No charge".

Q. Other than the cost representations that you have just discussed, "Free", "At no charge", and "No extra charge", have you, to your knowledge, either in the years you have been here or before — and when I refer to "you", I mean Edison — ever described the cost of the bulbs to the customer in any other fashion?

(21)

A. No.

Q. Have you, Edison Company, to your knowledge, ever submitted documents, Plaintiff's Exhibit No. 7, to the Michigan Public Service Commission or any of its predecessors for approval?

A. Which is number seven? I don't know the answer to that.

Q. Has the Michigan Public Service Commission or any of its predecessors, to your knowledge, ever requested copies of Plaintiff's Exhibit No. 7?

A. I don't know the answer to that, either.

Q. Referring to a letter, Plaintiff's Exhibit No. 6, has that letter ever been submitted to the Michigan Public Service Commission for approval?

A. I don't know.

Q. Do you know whether or not the Michigan Public Service Commission has ever requested a copy of that letter?

A. I don't know that, either.

Q. Have you ever testified before the Michigan Public Service Commission or any of its predecessors?

A. No.

Q. Has anyone from the customer services division of the Edison Company ever testified before the Public Service Commission or any of its predecessors?

A. Yes.

(22)

Q. Have they ever testified before the Public Service Commission or its predecessors with regard to your light bulb program?

A. No.

Q. Do you know of any occasion predating 1926 when anyone from the Edison Company customer services division, or otherwise, ever testified before the Public Service Commission or any of its predecessors concerning the light bulb program?

A. I would not have any knowledge of that.

Q. Does the company possess any records, documents, transcripts or any other memoranda concerning testimony

or other evidence — strike that — concerning testimony before the Public Service Commission or any of its predecessors concerning the light bulb program?

A. To the best of my knowledge, no.

Q. Has there ever been any discussion by the customer policy committee with regard to changing the characterization of the cost to the customer of the light bulb program?

A. No.

Q. Included among your customers are retailers of light bulbs, are they not?

A. Yes.

Q. Has the customer policy committee, or the customer services division of this company, ever concerned itself with the effect of Edison's light bulb program upon other retailers (23) of similar bulbs?

A. No.

Q. Do you know of any occasion when the Public Service Commission or any of its predecessors may have considered the effect of Edison's program with respect to its bulbs upon other retailers of light bulbs?

A. No.

Q. Has the Edison Company ever gathered any evidence, to your knowledge, of the effect of its bulb program with respect to its effect upon other retailers of light bulbs?

A. No, I —

Q. To your knowledge, has the Michigan Public Service Commission or any of its predecessors ever requested from Edison any comparative evidence of the kinds, types, number, costs and quality of light bulbs sold by Edison to those otherwise available on the open market?

MR. COHEN: Objection. His question relates only to those light bulbs sold by —

So the question is clear, you are asking about the light bulbs sold by Edison, or light bulbs exchanged by Edison? There are two categories.

MR. HOLSTEIN: I am talking about the light bulbs subject to the light bulb program.

A. Not to my knowledge.

(24)

Q. (By Mr. Holstein): Has Edison ever submitted any evidence, comparative in nature, to the Michigan Public Service Commission or any of its predecessors concerning the types, number, cost, quality of light bulbs, provided by Edison to those otherwise available on the open market?

A. No.

Q. Has the customer policy committee or any other — strike that — or, the customer services division, ever considered providing Edison's domestic and general service customers an option to purchase the light bulbs currently furnished in the light bulb program?

A. No.

Q. Has the Michigan Public Service Commission or any of its predecessors, to your knowledge, ever considered Edison's failure to provide its domestic and general service customers with an option to purchase light bulbs?

A. No.

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(29)

Q. Well, isn't the customer service department concerned with the total lamp program?

A. We are concerned with the mechanics of it, yes.

Q. Isn't one of the mechanics the fact that the bulbs are purchased from General Electric and other suppliers for resale?

A. These are decisions that are made by the tax people and the legal department.

Q. Are you the senior executive in charge of customer services?

A. Yes.

Q. As such, is it your testimony that you do not know whether or not bulbs provided as part of the light bulb program to your customers are indeed purchased from your suppliers for resale?

A. That is correct. That is why we have a tax department and legal department.

Q. Do you know whether or not the Michigan Public Service Commission or any of its predecessors has ever

been informed of the fact that you purchase bulbs from your suppliers — let me see the Exhibit 5, please — with purchase orders (30) similar to that marked Deposition Exhibit No. 5 wherein the box is, regarding Michigan Sales or Use Tax instructions and exemption claims marked resale, is checked?

A. Would you read that question again?

(Question read.)

A. I do not know whether they have been informed.

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(34)

Q. Has the customer services department of the company ever received any complaints from its customers with regard to any portion of the light bulb program?

A. Yes.

Q. All right. Would you tell us the nature of those complaints.

A. Before we went to the longer life bulb, we had complaints about the life of the bulb. We were going to change our mix of bulbs and eliminate the one hundred and fifty watt three-way, and we had enough objections we did not go that way.

Q. Other complaints? You never received any complaints of an agent being out of a certain kind of bulb?

A. No. We manage to maintain pretty good stocks even in agencies.

Q. Has the Edison Company ever provided Michigan Public Service Commission any evidence of the kinds, type, quality of bulbs it provides under its light bulb program?

A. Not to my knowledge.

Q. When you changed from providing a fifty watt bulb at the low end to a sixty watt bulb instead, did you request the approval of the Michigan Public Service Commission?

A. Just one correction. That is not the low end. We have twenty-five watt bulbs.

Q. When you changed from fifty to sixty, did you request the (35) Michigan Public Service Commission for approval?

A. I don't believe so.

Q. Has the Michigan Public Service Commission ever requested any evidence as to why you changed from a fifty to a sixty watt bulb in your exchange program?

A. No.

Q. Other than that change in the mix, have there been any other changes in the mix since the introduction of the Mazda — is that the name of it?

MR. NELSON: That is right.

Q. (By Mr. Holstein): — type bulb?

A. Since the beginning of time?

Q. Since the introduction of that, the Mazda bulb, into the program.

MR. COHEN: Just so we are clear. Are you talking about —

A. I am not sure when that started.

MR. COHEN: Mazda is a general incandescent lamp, isn't it?

A. Yes, but —

Q. (By Mr. Holstein): I am just asking, has there been any change in the mix other than the ones you told us about?

A. I don't know when the word "Mazda" came into the, or was eliminated. That is a pretty old term.

(36)

MR. COHEN: I think he is talking about, you have a present mix of bulbs, and historically has that mix changed in regard to incandescent bulbs?

Is that correct?

MR. HOLSTEIN: Right.

A. In general, no. The other principal elimination was the forty watt bulb back in 1948, something like that.

Q. (By Mr. Holstein): Did the Michigan Public Service Commission approve — strike that.

Did the Michigan Public Service Commission ever consider allowing you to eliminate the forty watt bulb?

A. The question is, did the Michigan Public Service Commission ever consider allowing us to do it?

Q. Yes.

A. To the best of my knowledge, they were not involved.

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(38)

Q. (By Mr. Holstein): Mr. Milby, are you familiar with a survey done by Detroit Edison in 1970 of its customers?

A. Yes.

Q. Showing you Deposition Exhibit No. 8, it professes to be a copy of the results of that survey. Do you know whether or not the Michigan Public Service Commission ever was furnished —

A. I don't know whether they were or not.

Q. They did not request that such a survey be made?

A. No, they did not.

Q. In regard to the economic analysis done on behalf of the Detroit Edison Company, 1955, do you know whether or not any of that information was ever submitted to the Michigan Public Service Commission?

A. Would you read that back.

(Question read.)

A. I do not know.

(39)

Q. (By Mr. Holstein): Do you know whether or not the M. P. S. C. ever requested any of that information?

A. That I don't know, either.

Q. Sir, the cost of light bulbs purchased for the program in question in this lawsuit, and whatever other marketing costs that are attributed to that program, are included in an account entitled — what is that? — customer installation expense, is that correct?

A. I guess I would have to say I am not sure of which account that is.

Q. Did you know what else is included in the account entitled customer installation expense?

A. Not without looking to find out.

Q. But there are other items included in that account other than the cost of bulbs, is that correct?

A. That I am not sure of.

• • •

(43)

Q. (By Mr. Holstein): Is it true, then, there has been no discussion by the customer relations department and/or the customer policy committee with regard to how you might handle the discontinuation of the light bulb program were that ever to come about?

A. No, we have not discussed this.

Q. Has any such discussion ever taken place with any other executives of the company other than those in the customer services department?

A. Not to my knowledge.

Q. In your affidavit on page two, you set forth that the light bulb program has received the most national publicity of any Detroit Edison Company service. To what national publicity are you referring?

A. This particular program is the most talked about by people all over the country who have had any occasion to be in Detroit. It is also the most talked about by other utility companies as having the greatest customer relations value.

Q. Do you know of any other utilities in the United States, besides Detroit Edison Company, that has been permitted to have a light bulb program as it exists?

A. Yes.

Q. Which one?

(44)

A. Lansing, Michigan. The municipal company up there.

• • •

(46)

Q. (By Mr. Holstein): Mr. Milby, in your affidavit, page two, paragraph eleven, you set forth your understanding of the historical basis of the lamp exchange program was, one: to acquaint Edison customers with the improved lighting provided by electric lamps as well as to make certain that the use of the electricity was encouraged by the

elimination of empty lamp sockets in the home, stores and offices of the Edison customers, is that correct? That is what you said?

A. That is correct.

Q. Now, there is no longer any practical necessity to acquaint Edison customers with improved lighting provided by electric lamps, is there?

A. No.

Q. Is there a practical necessity for making certain the use of electricity is encouraged by the elimination of empty lamp sockets in homes, stores and offices of Edison's customers?

A. I suspect this is still true, to a degree.

Q. And the practical necessity, what would that be?

(47)

A. I think with a two light lamp, people who have one lamp burned out, one bulb burned out, and the second one burns out, they will probably replace the two. But in the meantime only one is lighted. So to that extent, or a cluster ceiling fixture that requires more than one lamp, they might get along with one or two burned out.

Q. But if they get them from you, then they use them?

A. Then they get the sockets full.

Q. They have the sockets full, so the practical necessity, I assume, is the revenue to the Detroit Edison Company, is it not?

A. That, plus good lighting for the customer.

Q. Now, you stated that the bulbs are specifically manufactured for Detroit Edison Company by General Electric. General Electric Company, as I understand it, is not your only supplier of bulbs to be used in the lamp exchange program, is that correct?

A. They are the only one at the moment.

Q. But your affidavit — I see. In past years, though, you have bought from Sylvania and Westinghouse, have you not?

A. Right.

Q. Is there anybody besides those three companies that you could buy from at the present time?

A. Not that I know of that could provide the volume and the (48) quality that we would want.

Q. What about the price?

A. Or price.

Q. Mr. Milby, you indicated to me that the Consumers Power Company was required by their franchising agreement with the City of Grand Rapids to furnish light bulbs, is that correct?

A. That is as I understand it.

Q. Do any of your franchise agreements with any of the various municipalities that you deal with require you to furnish electric lamp service?

A. No.

Q. Do they require you to furnish the light bulb exchange program as is constituted in any of your franchise agreements?

A. No.

Q. Mr. Milby, there is a directive of the Detroit Edison with regard to its exchange agents, bulb agents — it is Exhibit 4 attached to the interrogatories, answers previously supplied by your counsel. It is entitled "Customer relations routine instruction". Are you familiar with that document, sir?

A. Not in detail, no. I don't know all the procedures and policies that we have in that much detail.

Q. Were any of your procedures or policies contained in that (49) document — you can look it over — ever approved by the Michigan Public Service Commission?

A. Not to my knowledge.

Q. Did Detroit Edison Company ever furnish the Michigan Public Service Commission with a copy of that document?

A. I don't know.

Q. Did the Michigan Public Service Commission or any of its predecessors ever ask to be furnished with any of the information contained in this exhibit?

A. Not to my knowledge.

Q. Did the Michigan Public Service Commission or any

of its predecessors ever approve or disapprove of the fourteen different type bulbs that are currently being utilized in the light bulb program?

A. No.

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ARGUMENTS ON MOTION FOR SUMMARY JUDGMENT

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(3)

Detroit, Michigan
Monday, April 22nd, 1974
2:00 p.m.

PROCEEDINGS:

THE COURT: Now, Mr. Cohen, how much time do you want to present your side?

MR. COHEN: If possible, your Honor, 20 minutes, maybe five to ten for rebuttal and I have one witness whose cross-examination should take no more than ten minutes at best.

THE COURT: A half hour to a side, then?

MR. SKLAR: Yes, your Honor, half hour would be sufficient.

I would like at this time to allow Mr. Nelson to speak for the plaintiff on a motion.

MR. NELSON: I would like to make a motion, your Honor, to admit to bar of this Court, for purposes of this proceeding only, Mr. Michael Sklar —

THE COURT: Somebody coughed just then, and I didn't hear the name of the gentlemen.

MR. NELSON: Michael Sklar, Robert Holstein, and Burton Weinstein, all of whom are members of (4) the Illinois Bar, and each of them are members of the Bar of the Supreme Court of the State of Illinois, and also they are members of the Bar of the Federal District Court for the Northern District of Illinois and I so move their admission.

THE COURT: I am happy to grant that motion and to welcome you to the Bar of this Court for the purposes of this case.

MR. SKLAR: Thank you.

MR. HOLSTEIN: Thank you.

MR. WEINSTEIN: Thank you.

THE COURT: I must say that in a sense there will be slight inconvenience to you gentlemen for which I apologize, but the matter that just came a moment ago, when you were interrupted has to do with a bond reduction hearing which I was supposed to have taken up this morning and it didn't come off, and I'm willing to undertake it this afternoon. It shouldn't take very long, and if you don't mind, I would interrupt because we have got several people who have been waiting for a long time. Then, I will hear the moving party first here. Detroit Edison brings a motion for a summary judgment.

MR. COHEN: This court knows the (5) plaintiff in this case has brought a class action against Detroit Edison, which relates primarily to its lamp exchange program, being the program contained in the rates and tariffs approved by the Michigan Public Service Commission, which basically gives the customer the right to exchange certain size light bulbs at the various customer service outlets which Detroit Edison maintains for whatever light bulbs or whatever size they wish to have. That basically is what is involved in the lawsuit. The plaintiffs have alleged and obviously not going into their whole theory just for the purposes of my argument, that this is a anti-competitive practice for the reasons set forth in their complaint. We allege in that portion of our summary judgment motion, which is before the Court today that this is really a classic Parker -vs- Brown type of situation, in which the lamp bulb exchange program is an intimate part of the tariff and rates approved specifically by the Michigan Public Service Commission. As such, they are state acts, affirmative state acts within the meaning of Parker -vs- Brown, and therefore, not susceptible to anti-trust attacks. We, of course, are not suggesting they are without remedy. Under Michigan Statute, of course, they have the right to petition

the Public Service Commission (6) for a change in the rates for the services or the conditions of the rates. If they are unsuccessful, they have an appeal as a matter of right to the Circuit Court in Ingham County, which sits as a court of chancery instead of a resolution court. It has a chance to make or to determine whether the Michigan Public Service Commission action is a proper course, manner of course. They have the usual appeal procedure from the Circuit Court in Ingham County. Now, by way of background, Detroit Edison operates as a result of franchise agreements they have entered into with the various communities to whom they furnish electric service. This is provided for by the Michigan Constitution, in both the 1963 Constitution and the earlier constitution, I believe in 1908, to preserve to the local community the right to enter into franchise agreement for the use of their streets and their easement, or to run their own utilities if they so desire.

Now, each and every one of those franchise agreements contain a provision which is attached to the plaintiff's answer to our motion, which provides that the rates, the charges, services, will be subject to the — whatever the charges, rates and tariffs are of the Michigan Public Service Commission so that in each of the franchise agreements reference is made and the parties have (7) agreed to abide by whatever agreement the Michigan Public Service Commission makes in regard to rates and regulated services, whatever the conditions are that go into the particular rates so that no matter where we operate the MPSC has absolute power and authority over whatever rates we charge or over our conditions of service. The statute in this case is a very broad one and starts out by giving complete power and jurisdiction to regulate the public utilities or private utilities to the MPSC, and it's extremely comprehensive in terms of rate change, term of service, and anything that is incidental thereto although the words are contained in the appropriate statute. Now, as a practical matter, the way the rates are handled, Detroit Edison, first prepares what it thinks the rate should be, support-

ing data for each of the items in their schedule and submits it to the Michigan Public Service Commission. It is then gone over page by page by the staff, and we have a witness from the MPSC to testify how the procedure works. The Commission then meets, makes whatever changes it desires, if it desires to make changes in the rates we can charge and the services incidental to those rates are approved actually on a page-by-page basis by the MPS Commission. We have no authority to do anything, (8) and there must be prior approval, which I think is the key word here, by the Commission in terms of our service, rate, discount terms of payment. All those things go into the rate structure which is called the rate.

Now, also included in the rate itself is a special designation light bulb exchange program that is specifically part of the rate structure as published, and is submitted to the Michigan Public Service Commission and in each case that we have asked for rate changes which has been approximately four times since 1970, that program was specifically approved as part of the general rates and conditions attached thereto so that in all cases here you have affirmative state action, you have complete jurisdiction in the state body to change or not to change as you so desire. You have a procedure by which an agrieved party can appeal to the state or petition the state to make any change in rates or conditions or services. You have none of the kind of situations which have led to some general kind of exceptions to basically the Parker doctrine. Now, I think to the Parker doctrine there have been some exceptions, and also, I think some confusion mostly because oftentimes the Parker doctrine gets confused or mixed up, or considered in terms of the Moore Pennington Doctrine. I'm sure this (9) Court knows the Moore Pennington Doctrine refers to a balance of the First Amendment rights, the right of the people to petition their government and how far they can go, and the policies of the anti-trust lawyers to balance the First Amendment against anti-trust, and of course, that is not involved in this case.

There is another series of cases such as the Otter Tail case, which the defendant cites. I think the Marnell case,

which had to do with the latest one that had to do with it, AT&T rates were the course, and also I should mention the Hecht case, where the Federal Courts are balancing Federal statutes against other Federal statutes, which is not involved here, where the court looks at the intent of the Congress in passing certain legislation and they look at the intent of Congress and the body of the anti-trust laws in an attempt to balance those out. This happened in Hecht, and Marnell, which is not involved here. We are not balancing the Federal statutes against each other. You have got the more constitutional version kind of Parker exception cases. The ones we cite in our briefs, don't except them. There are some that do, those are basically the telephone cases where the phone company is allowed by state statute to file a tariff which has the (10) force and effect of law unless there is some positive action by the state to the contrary, in other words, sort of a negative option thing. The state in those cases ordinarily only has a right to make sure the tariff is reasonable as a claim of the area kind of power that's involved in this case, but I think this goes to those decisions, even to those decisions we have out contrary decisions have gone to the positive state action that is required before those kinds of tariffs take effect. The telephone company simply filed a tariff. If there is no state action within 30 days, the tariff has effect as filed by the company without any positive kind of state action.

THE COURT: Has there ever been any regulatory body inquiring into this free light bulb program?

MR. COHEN: Within the State of Michigan?

THE COURT: Yes.

MR. COHEN: Only to a limited extent in 1964. I believe we wished to make some change in our tariff insofar as comercial users were concerned. In other words, to cut comercial users out of the tariff and to that extent there was a limited kind of state activity which (11) determined whether or not we are entitled to do that, or whether or not we shouldn't be allowed to do that.

THE COURT: As it relates to the light bulb program.

MR. COHEN: Right, in other words, our large com-

mercial users really didn't have that much need for it as I understand it, and wanted to get out of it. So, we then specifically asked permission, which I think is the key word in the MPSC in modern days. All these alphabetical numbers sometime escape me, but we asked specific permission then to withdraw that section of the tariffs and services which applied to the exchange program for the large commercial users, which was given to us.

Also, we have a witness today who at one time himself — he's the head of the Commission, had recommended to the Commission, as he will testify, that the program be done away with. That was his personal feeling, that it should be, and as I understand it, at the staff level he was turned down, but there is no question that they have been aware of this program ever since its inception. As a witness he will go into that. That he personally had considered it, that the MPSC had considered it at various times both in '64 and extensively, at least (12) when the witness made his recommendation that the program be done away with, but nevertheless, specifically approved that program continuously since that time. I think the key is that there has been positive state action in a sense, even though the particulars of the tariff has not been openly challenged in a public hearing, but then, of course, there may be 20 or 30 other sections which also have not been challenged. Our discount rates have not been challenged. How much you deduct for payment, early payment of your bill, that has never been challenged. The amount of time we have to hook up equipment. In other words, there are any number of things in the rate schedule that has never been challenged. I think the key is that the rates that we do have all require affirmative approval. We cannot get off the lamp bulb program unless we get permission from the MPSC. There has to be affirmative action on their part. We cannot engage in it without specific permission, and if anyone wants to challenge it, the MPSC had complete jurisdiction to determine whether or not this is a just and reasonable program and whether it should be continued or not be continued.

THE COURT: Are there franchises in which you do not participate in the light bulb program at (13) issue here in Michigan?

MR. COHEN: Not to my knowledge, your Honor. I have one of our experts on rates. My understanding of our franchise is there is a light bulb program, the reason for that being is that all the franchise refer specifically to the MPSC tariffs, it provides there should be uniformity of the franchise, therefore, the word is "stuck" or whatever it is, whatever the MPSC says is a tariff, that's the rate at any particular time, that is what we have to adhere to in each of our franchises. Now, I will check to be sure on that before I finish, but that's my understanding.

THE COURT: I don't know that that would be dispositive of it, but let me ask you another question. Do you then say that Parker or the state action doctrine applies here because the matter of cost of the light bulb program and its availability or non-availability is subject to state regulation?

MR. COHEN: Particular, your Honor, and also because the tariffs themselves provide for a lamp supply program. They specifically have a section which says lamp supply and sets forth the conditions under which we must supply lamp bulbs to our customers. For instance, I'm reading B 5.5 "bulb lamps will be furnished without (14) extra charge; one) to residents connected for the first time in such quantities as may be needed for all permanent fixtures; two) as replacements of previously burnt out lamps in proportion to the use of energy for lighting purposes under the applicable rates." The rates in the tariffs, we have to supply them, we have no choice. What I'm saying is the one thing Parker is clear on is where the legislature has determined, and the word is one the court's latin phrases I can't pronounce, where the legislature determines that the competition is not the summun bonum, I believe is the word, legislature decides there is going to be literally regulation rather than competition, when that decision has been made, then, Parker comes into effect. Now, I don't think there is any question under any

of their cases that that's where the bread, meat and the potatoes, and the merger cases they cite where they said Parker did not apply because this is — it was a merger situation. The court said rates are the bread, meat and potatoes of the state action. Here we are dealing with rates of which lamp supply is a part. We're dealing with a written area where the legislature has determined that they are going to allow limited monopoly at the expense of competition, but the expense is you're going to have pervasive (15) kind of regulation, then, when you have that kind of situation where the regulation challenged is in effect mandated by the state, as opposed to some of the telephone tariff cases, there it is specifically approved by the state and state procedure for challenging it's I suggest to the Court, this is really a classic kind of Parker v. Brown situation. Some of their cases, the Witten v. Pool case, which is basically a Moore Pennington case, had to do with a situation where the state required competitive bidding, not regulation. One of the competitive bidders got together with the state officer to have his specifications adopted so that nobody else could compete, but this is really an interference with a competitive bidding statute which the state had established. It wasn't a situation where you are dealing with a monopoly. You had a competitive bidding situation. You couldn't use Parker v. Brown for excusing bribery of a state official to use your specification. In the Woods case, which they rely on, you had a state body where a number of producers of oil, gasoline got together, natural gas, actually, and they falsified the information which they gave to the state, and the court said you can't use Parker v. Brown to cover up the falsification of information which you presented to the state, upon which the state (16) has acted, that it's going to shield you, but this, we have none of those factors here, your Honor, that are involved in any of those exceptions, and you have really an almost classic kind of example where the state has taken over complete, absolute regulation where whatever we do has to be approved by the state. When the state commission meeting has actually approved and mandated all of our aspects

of the tariff rate picture whereby the lamp exchange program is an integral part of that rate structure so we can't change it, get rid of it, or anything else without approval of the state. I think those are pretty much uncontroverted facts, and on that basis, on Parker v. Brown, we feel it is a peculiarly appropriate case for summary judgment treatment by this Court.

Now, did the Court wish to — I didn't know how to handle the witness. Whether you wished to handle —

THE COURT: Well, let me ask you this: Did you discuss with your brothers what the extent of his testimony is? Perhaps they can stipulate to it.

MR. COHEN: The testimony is simply that he is — he not only — he has participated as a supervisor.

(17)

MR. SKLAR: Your Honor, before the witness's testimony is added into the record, we want to state an objection to the witness being examined or to any summary of his testimony entered into the record. The hearing this afternoon was called for argument on briefs and affidavits which the parties have previously submitted. We have had no prior warning nor discussion at all whatsoever with respect to additional evidence, and the additional argument, and would strongly object to the introduction of any evidence at this time related to the summary judgment motion.

MR. COHEN: May I just say this, your Honor. This is not anything additional, this is simply corroborative of what we have stated in our brief. It occurred to us there may be some question as to any of those points, and for evidence we would suggest, or whatever use the Court wanted to make of it, we subpoenaed the supervisor of the Electric Section of the Public Utility Division so if there are any disputes on any point he can answer the questions for us or them.

MR. SKLAR: Here again, your Honor, I feel we have no warning at all, no chance to prepare for cross examination, and no possibility on our part to present (18) rebuttal evidence or prepare for rebuttal evidence. I think

it is highly irregular. I have not faced a situation where I have come to make arguments which were all raised by affidavit, where I also had to face the element of surprises and rebuttal testimony.

THE COURT: That isn't so unusual, at least it hasn't been for me. I will hear your argument first.

MR. COHEN: I didn't mean it as a surprise, your Honor, I thought it would be a good thing to have him here.

THE COURT: Very well.

You are Mr. Sklar?

MR. SKLAR: Yes. Obviously, we see this case very differently. We see the application of Parker v. Brown to this situation, to this case, as being one of fact and not one of some type of perfunctory activity by the State of Michigan, if there are any activities at all.

THE COURT: What remedy do you seek here that you could not obtain in a state agency or state tribunal as your brother suggested?

MR. SKLAR: We seek several reliefs, (19) one of which we have monetary damages, which the Michigan Public Service Commission has no authority to order.

THE COURT: Is that in the state court?

MR. SKLAR: It may be possible in a state court under the Michigan Antitrust Statute to obtain relief, but we have selected the Federal court because we feel here is the place where the expertise exists to review antitrust matters as between the state court and the Federal court. It is our opinion that the Federal court is the more expert forum in which the matter should be reviewed.

THE COURT: Are damages the sole goal that you seek here?

MR. SKLAR: We also seek injunctive relief.

THE COURT: That you could get in a state court.

MR. SKLAR: I don't belief we could.

THE COURT: You mean you couldn't go — if this is a bum idea to be passing out light bulbs as your complaint suggests, can you go to the state regulatory body and seek its elimination?

MR. SKLAR: The state regulatory body, as we view it, has authority to review and to regulate the (20) reasonability of rates, and it may well be, theoretically at least, the Michigan Public Service Commission can tell Detroit Edison to avoid including the cost of the light bulbs in its rate base for purposes of determining its rates, but we don't believe that the Michigan Public Service Commission can tell Detroit Edison that it can't sell light bulbs, or that it can't sell tiddly winks, or it can't build a building.

THE COURT: Have you tried?

MR. SKLAR: No, we have not. We feel it is an antitrust case, and we're interested in the damages as well as injunctive relief.

THE COURT: More damages than injunctive relief?

MR. SKLAR: I would say actually certainly the damages takes care of the past, the injunctive takes care of the future.

THE COURT: Why should we worry about the past? This has been under a state regulatory body, why not just worry about the future it is a bad practice?

MR. SKLAR: Well, this is a crucial question as to whether or not it has been under a state regulatory body. It is our contention that, in fact, it has (21) not been under a state regulatory body. It is our contention that we will have to go into the facts at some detail long before the Michigan Public Service Commission or any of the procedures wherein the — even Detroit Edison Company was distributing light bulbs in connection with electricity rates.

THE COURT: Let's talk about the date after the regulatory body took over. It would be their suggestion that they can't abandon or cut down on this light bulb program without permission and approval. Do you agree with that?

MR. SKLAR: Your Honor, under the statute any public utility, including Detroit Edison, can make a change in its operations which does not effect or result in increased costs to its customers.

THE COURT: What about my question?

MR. SKLAR: Without a public hearing by the Public Service Commission.

THE COURT: Would they have to get approval as Mr. Cohen suggests?

MR. SKLAR: Approval, it's a difficult word. They used the word approval throughout their argument.

(22)

THE COURT: What word would you like to use?

MR. SKLAR: I don't think the word is helpful. I think a word, if any word is to be used, is "considered judgment" thought that is the basis upon which the Parker v. Brown cases have been decided, and approval is kind of a bad word, and has become a bad word in this case, which I think is unfortunate because it can mislead counsel and it can mislead the Court.

THE COURT: But let me ask you this — simple question because I would like to get an answer — It may be helpful to me based on what your answer is, whether or not it is helpful — does the regulatory body have the power to say to Detroit Edison, as Mr. Cohen suggests, you must secure our approval before you withdraw this light bulb program in any franchise that you administer.

MR. SKLAR: My answer would be no, your Honor, they don't, and I want to cite, your Honor, some sections of the statutes under which the Michigan Public Service Commission, in fact, does operate. In the first place, the quoted provision upon which defendant is relying has a very key phrase in it, and it says "The Michigan Public Service Commission is hereby vested with complete (23) power and jurisdiction to regulate all public utilities in the state except any privately owned utility except otherwise restricted by law." Now, therefore, there are several things that flow from that. The first in the question of whether the Michigan Public Service Commission under the Huron Portland Cement Case is vested with the identical power as their predecessor had, the Michigan Public Utility Commission had? Section 46.551 in the Michigan Revised Statutes has given specific authority as to what it may regulate and what it may be concerned with.

What it may be concerned with is the rate or charges to be made to the customer for the electricity so transmitted and distributed, and the rules or conditions of service upon which electricity can be transmitted.

It's our contention that Section 6, upon which the defendant relies is a grant of general jurisdiction. The Huron Portland Cement case recites the substantive powers as to what the Michigan Public Service Commission may do, may consider, and may not do or consider under the statutes of the State of Michigan. Overriding the entire issue, I think is the question as to whether or not the Michigan Public Service Commission can be concerned with matters that are inherently not public utility matters, (24) that are inherently not matters affecting public interest.

It's our contention that the distribution of light bulbs, like the sale of automobiles, or the sale of appliances, if you will, are not matters that are effected with public interest, and in answer to your question, your Honor, I recognize it's a fair question as to whether or not the Public Service Commission can order Detroit Edison to cease doing what it is doing, I believe the answer is no. I believe what the Michigan Public Service Commission can do is simply direct Detroit Edison to eliminate the cost of its light bulb program from the cost which is used to obtain a rate for electric energy.

Now, there is an interesting aspect to that also because over the years the cost of the light program has never really been identified to the Michigan Public Service Commission, or to the people of the State of Michigan, or apparently, in fact, within Detroit Edison's own organization. The cost of the light bulb program surely is a lot more than just the cost of the bulbs. There are service center people that have to be maintained, people who are involved in the program. All of the costs have been hidden and covered up, whether intentionally or unintentionally, we don't know, but the Michigan Public (25) Service Commission has never reviewed the cost of the program and it would probably be an extremely difficult, and perhaps impossible task for the Detroit Edison Company and the Michigan Public Service Commis-

sion, in the form that the Michigan Public Service Commission operates in, to isolate what the costs of the light bulb programs actually are. So, again, in answer to your question, can the Michigan Public Service Commission direct Detroit Edison to stop its program, I think that the only thing they could tell them to do is stop using the cost of the program as a basis for their rates, and I think that would be extremely difficult to accomplish in view of the confusion and the highly intertwined relationship between their cost and the tariffs which they attend. So, I believe, that perhaps theoretically there is a limited amount that the Michigan Public Service Commission can do, but practically, I think it's extremely difficult for them to do it, and as a matter of law and right, the plaintiff deserves to be in court and is entitled to relief which this court can grant it.

In any event, your Honor, we view the question of whether or not the Michigan Public Service Commission has acted at all to be a matter under Parker v. Brown and subsequent cases of fact, and actual fact what (26) did they do within the Michigan Public Service Commission over this 80-year period that the program has been in effect, over some 65 or 60 years service of the Michigan Public Service Commission, and the procedure has been in effect. What kind of judgment has been exercised by the Michigan Public Service Commission as to the need for a program like this? What has the State of Michigan done in a Parker v. Brown sense? What great problem has been solved by the lamp exchange program, that is whether or not the State is becoming involved in this thing?

THE COURT: What do you say they have done?

MR. SKLAR: Nothing.

THE COURT: So, your proofs will be put in the time it takes to cite it.

MR. SKLAR: That's correct. In fact, it takes no time to say it, so, for what the evidence is nothing has been said to anybody at any time.

THE COURT: You're willing to be bound in this record factually that the Michigan Public Service Commis-

sion and its predecessor regulatory body has done nothing in this area?

MR. SKLAR: Yes.

(27)

THE COURT: You may continue.

MR. SKLAR: Not to qualify what I've said, but I think it is important that I acknowledge to this Court the submission to which Mr. Cohen refers, the 1964 submission, which is simply, again, a rate sheet apparently in an informal procedure in which tle light bulb program to some extent, for some customers was slightly amended, but I would contend that the Michigan Public Service Commission had not exercised considered judgment and did nothing, and at least there is no evidence on the record today that the Michigan Public Service Commission did anything with respect to the light bulb program in 1964.

THE COURT: Well, that is true, there is nothing here yet, but Mr. Cohen suggests that he wants to supplement what he has in his papers with some testimony here, and I just wanted to know what your position was, and I take it that you flatly say that no regulatory body in Michigan in respect to the program has done anything.

MR. SKLAR: That's correct, your Honor, as far as we know there is no evidence of that.

THE COURT: Well, how do you handle the proposition that I can see coming down the road now, (28) and that is, that no matter how you slice it, the light bulb program costs something. As you yourself said, it's a complex program, they have got service centers; they have got the cost of the light bulbs, the personnel, and I know you said it's hard to separate cost. You suggest that it is costly.

MR. SKLAR: By all means, and I think there are some important considerations for the Court that flow from that fact as well.

THE COURT: Well, apart from the consideration for the Court, I would like to talk about the consideration of the MPSC, at least what they did was to approve costs which included those figures of light bulbs.

MR. SKLAR: I am only willing to concede a very limited thing. I'm willing to concede that the cost of purchas-

ing light bulbs was submitted to the MPSC under an account entitled, I believe, "Consumer Installation Charges."

THE COURT: Then, let me ask you this: Is there a cluster of activities which a regulatory body such as MPSC, could engage in in this field, which is done — that is to say, if these activities in a cluster were done, (29) would that in your mind bring it within the department, and if so, what are the activities?

MR. SKLAR: Of course, we're only speculating, but I would imagine that a continual monitoring of the program as it is administered by the Detroit Edison may well bring the light bulb program within Parker v. Brown doctrine. Assuming — assuming that the Michigan Service Commission has the authority to regulate that kind of activity.

THE COURT: Let's assume that so we don't get bogged down. What do you assume comes under the rubric of monitoring?

MR. SKLAR: I would consider the requirement that as how many light bulbs are distributed as to the accounting for the receipt of bulbs, and as to how the program is advertised, which we consider to be a misleading and possibly fraudulent method of advertising a program. I would consider the kind of bulbs that are purchased as to whether it's better to have longer life, less light from a bulb, I would consider the amount of electricity the bulb uses being an important factor. I would consider the availability of the bulb to the public. I would consider the rate of use of the bulb, (30) whether the public who are being charged a rate for electricity are, in fact, using the program and the extent to which they are using it. I would consider whether or not all segments of the economy and all people are being treated equally with respect to the light bulb program. I would consider the cost and the practice of Detroit Edison as a material fact to be considered by the Michigan Public Service Commission. I would consider it the competition of the program as it effects, perhaps, the most important consideration under Parker and the other cases. None of these things have ever been considered, at least there is no evidence that any of these things have been considered by the Michigan Public Service Commission.

THE COURT: What inquiry have you made to determine whether or not any of the activities that you have now listed for me are not being considered?

MR. SKLAR: Mr. Nelson, our co-counsel spent two days in eliciting, going through the records of the Michigan Public Service Commission and discussing the various offices of the MPSC, what they knew about the light bulb program's history, how it came about, what involvement the MPSC has had with it, and I don't know if you want to speak to him, but I briefly obtained, which (31) I submitted previously, indications about that kind of activity, that there is none, and beyond that, what we have been able to learn in the discovery deposition of the defendant's own officers who are charged with administering this program is that nothing has been submitted to the MPSC, and nothing has ever been said by the MPSC, and the members of the public have never questioned the program before the MPSC.

In summing up that point, we feel that under Parker and the cases that we cited to the Court, that there simply is no evidence at all of considered judgment, and that it is considered judgment about the program and particularly its effects on competition today under the recent cases which is a sine qua non of obtaining a state action exception. And regardless of what we might theorize about the MPSC, what they may have done in the past, the fact remains that that is the fact, that there is nothing. This program began as a device to increase the use of electricity, then it was motivated by Edison and directed by Edison. Through some form or another it became a part of their rate sheet. There is evidence here as well, your Honor, that the predecessors of the Michigan Public Service Commission began activities in 1909 under the Michigan (32) Statute, but it wasn't until six or seven years later that Edison considered it necessary or advisable, and for whatever reason, to bring the light bulb program in some fashion to the attention of the regulatory authority. Clearly indicating, I think — at least for purposes of summary judgment where inferences have to be resolved in favor of the parties defending a motion — clearly indicating that there is some question as to

whether or not the Michigan Public Service Commission is really interested in the light bulb program. And I think there is an awful lot in evidence that would support this theory. So year after year they wrote a five- or six-line description in their rate sheet; so what is the state action? Is state action then anything that Edison or any regulative authority wants to do. All it has to do to exempt itself from antitrust laws is to put it in there — put it in their rate sheet and hope that somehow or another the regulatory body will put their stamp of approval on it.

Now, that is not state action, that is not what the antitrust laws are all about, that is not what the Supreme Court is saying when it decides a case like Otter Tail, and it says that the antitrust laws of the United States are supreme, and only in the most extreme (33) circumstances and clearest mandate that the antitrust laws will be satisfied. That is not the modern practice to allow a public utility to operate carte blanche, particularly in an area where across the river, or outside of the territory people can go and buy light bulbs anywhere they please, and there is free competition on the price of light bulbs, that is not the modern way, not the sensible way of operating. That's what the Supreme Court is telling us in Otter Tail.

It's true, I will agree with Mr. Cohen, there is a distinction, at least historically between the considerations of state action matters and the consideration of competitive Federal policy, but there is not a world of difference between them, and the difference is growing smaller.

Fundamentally, Mr. Cohen attempted to criticize, or at least distinguish the Wood Exploration case involving the tax on gas and oil fields as being kind of out in left field since it involves the submission of false information to the Federal Commission on Taxes. There is something of that in this case, and it is kind of glaring, and that is this whole idea of their deception on the question of cost. What does the program really cost? Well, Edison has never told the Michigan Public Service Commission what the program really cost. It has never told (34) the people of the state what it cost. They don't really know what they are paying for a light bulb, and the other aspect of it is the fact that

the description in the rate sheet, as well as their description and advertising to the public talks about an exchange or free bulbs, and clearly they are not. There is no exchange charge, people come in and have to turn in some bulbs, but there is evidence that Edison takes the bulbs and throws them in the waste basket, they do not exchange the bulbs, they charge their customers full price for all of the bulbs. There is no exchange, there is no value reflected on Edison books for bulbs received.

THE COURT: What do you mean by charge the customers full price?

MR. SKLAR: They obviously have to charge the customer full price for the bulb, at least what it costs them to maintain the program.

THE COURT: What kind of device? You mean hiding in the rates?

MR. SKLAR: That is correct, your Honor.

THE COURT: Anything else?

MR. SKLAR: No, I believe that I have (35) fully covered the things I want to say.

THE COURT: Well, is there anything you wish to ask? I will give you gentlemen a short recess while I take this other matter, and if you wish to raise any other matters after the recess, I will hear you on it, and then I will hear Mr. Cohen.

MR. SKLAR: Perhaps depending upon Mr. Cohen, we might have further argument in regard to what the witness says.

THE COURT: We will take a brief recess.

(Recess taken.)

THE COURT: Do you wish to present anything at this stage, Mr. Sklar?

MR. SKLAR: I do, your Honor. I just want to make a few concluding remarks. I'm taking your Honor up on his kind offer of consulting with co-counsel.

There are some interesting aspects of the case that arise out of the relationship of these franchises to the power or limited power of the Michigan Public Service Commission. Your Honor asked me one of the questions, which I think is a terribly important question. (36) Can the Michigan Pub-

lic Service Commission tell Edison to cease the program? Now, the problem is, and this is the reason why, I didn't explain to your Honor that they can't, at least in the same respect, go as far as Mr. Cohen had indicated. Some of the franchise agreements I asked from him, I think the evidence will show some of them, include light bulb programs. Under the Michigan Statute, as we have stated, under the orders Mr. Cohen indicated, and under the Constitution of Michigan, these franchises are superior to the order of the Michigan Public Service Commission insofar as the rates are concerned. That says something about the limited power, if you will, of the Michigan Public Service Commission.

THE COURT: What does it say about the ability to enjoin the problem?

MR. SKLAR: It says nothing about our ability to enjoin the practice. Your Honor has full right under the antitrust law to do that. I'm saying between the Michigan Public Service Commission and the various cities that franchise Detroit Edison, that there is an obviously confused state if the Michigan Public Service Commission can't tell Detroit Edison to stop doing something in a situation where they have agreed by contract with the cities to do it. (37) So, those are all kind of interesting aspects of the case in terms of the power of the Michigan Public Service Commission, which we would argue is highly limited. Then too, if theoretically, at least the Michigan Public Service Commission could tell Detroit Edison to eliminate the cost of the program from its rate base. Detroit Edison still is free to go ahead and operate and sell light bulbs. There is nothing in the article of incorporation that we know of, there is nothing in the statute of the State of Michigan which would prevent them from doing that as long as they do it without including the cost of the bulb in their rate base.

THE COURT: That would effectively stop it?

MR. SKLAR: That would effectively stop it, but I think we would still have a problem with whether or not this court attended, which is whether or not there is still a violation of the antitrust law through the market dominance and we couldn't dispose of this case, and of course, there

is the rights which the plaintiffs are entitled to, which recurring in their action which would not be adjudicated by the action of the Michigan Public Service Commission, but in closing, your Honor, I would (38) like to put this motion, and what we're here for, the fact that this is a summary judgment motion, and in summary judgment matters, as your Honor will notice, that the inferences that must in a case should be construed where there are inferences to be drawn in favor of the respondents in this motion, particularly in antitrust cases. As the Supreme Court stated in Fowler v. Columbia Broadcasting, that is, there are substantial matters that are involved, there are witnesses to be heard, the issues are not simple and easy, and they are not simple and easy in this case if your Honor chooses to see it.

We feel at this stage in the litigation of an antitrust case of some proportion that without the opportunity for the court to fully examine the program in the antitrust aspect to say this matter should be disposed of, I think would be contrary to what Fowler is all about and what the Supreme Court will say.

There is finally this point. That is this. Summary judgment motions in the cases where summary judgment has been granted on a state action question, were either cases where there has been a full hearing as in the case of Virginia Power, or for that matter, has been submitted to the court on affidavit and there has been a (39) hearing on the part of the regulatory agency. Which is the reason we feel this is not the stage of the litigation in which to terminate it. Thank you.

MR. COHEN: I would like to respond to those remarks, your Honor. Number one, I might just perhaps say generally in plaintiff's words rather than defendant's words, and you will fully understand why summary judgments are frowned upon and particularly in a complex antitrust case. If there is a valid legal ground, it seems to us to make more sense to us that in the beginning, rather than when you have gone through the kind of complicated class action determination and discovery and all of the rest, that is generally such as an antitrust case to put it into focus. I hope to put in a different kind of focus, to better put into focus

the concept between Parker is simply that the antitrust laws do not apply where state action is involved and the whole concept we are talking about is what is state action, that is Parker's protection at a very minimum. I don't think that the cases they cite are where there has been an affirmative state action or where affirmative state action is required, and the court has held unanimously that Parker applies, but when you get into something less than positive now by the —

(40)

THE COURT: May I ask you a question?

MR. COHEN: Certainly, I'm sorry.

THE COURT: Hasn't the argument been this afternoon, though and perhaps I haven't gone into it, but the question, as to the Federal questions that are in the question, nonetheless, hasn't the argument focused down to this point: Assuming for the sake of your position for summary judgment, that the cases can be reconciled, although this may be a little difficult, and assuming that cases like Washington Gaslight v. Virginia Electric and that cluster of cases were applied, you say that there were certain things that the regulatory body does and Mr. Sklar said the regulatory body does nothing.

MR. COHEN: Your Honor, I didn't mean to interrupt.

THE COURT: Ought there not be, assuming that the law doesn't give us too much trouble, that is to say in citing the cases, ought there not to be a evidentiary hearing to determine whether or not there is state action —

MR. COHEN: The answer —

THE COURT: In view of the assertion by your brother that there is not state action.

(41)

MR. COHEN: I'm opposed to the evidentiary rule, but however, the assertion of my brother is not through affidavits. I think the affidavits are clear and uncontroverted in this matter. Number one, every single one of the franchise agreements to which I refer is subject by agreement through the parties to the rules and regulations and services and so forth to the MPSC; Number two, the lamp exchange program is a part of the rate structure and is published as a part of the rates, and number three, we can put no rates into effect and have put no rates into effect where a lamp program is involved or otherwise without the affirmative approval of the MPSC. Now, those things I think are uncontroverted on the record.

Now, what my brother is suggesting is that we go a step further than the cases that has been cited. He is saying that the fact that the state has approval is not enough, that the court has to go beyond the state approval and determine the amount of attention that the state has given to this particular aspect of the rate, and to what detail they have gone into them, and really how well the state did its job and how thoroughly the state did its job prior to the time that it approved (42) the particular rates. That includes the lamp exchange program. In other words, he is asking the Federal court to go beyond affirmative state action to determine whether or not the state action was, in fact, a thorough kind of consideration before the state action was taken, and I think as a matter of law, your Honor, that this is precisely what Parker intended not to do.

THE COURT: Hold for a moment. Whether or not there is any difficulty that one has in molding the cases into a overall solid principle of law in this area, hold that for a moment. You say that these affidavits show that there is some state action?

MR. COHEN: That there is state action to the extent that the lamp program is included within the rates and services under the rates, and that each and every one of the rates has to be, and is in fact, approved affirmatively by the MPSC. That is uncontroverted in the affidavit.

THE COURT: Hold that. Do you agree, Mr. Sklar?

MR. SKLAR: I don't agree that they are approved, your Honor, no, I don't agree either that all of the franchise agreements include a submission to the (43) affairs and authority of the Michigan Public Service Commission. Now, we have the franchise agreement of the City of Detroit here, which I understand is still in effect, there is no amendment, no provision in here with which makes the

franchise agreement subject to the orders, directive of the Michigan Public Service Commission. I don't agree with this assertion, no.

MR. COHEN: He argues about the word approval. I'm talking about uncontroverted affidavits, our particular franchise itself. There is no question that it is stamped by the Commission and that we cannot put it into effect until the Commission has stamped its approval on each and every one of our rate sheets, that is an uncontroverted question. He is playing games, I don't want to use that, that isn't fair, but he is moving around the word approval to mean something more than giving — have given assent to an affirmative way. I think my colleague has to agree that no rate can go in effect until the Commission itself has in some way or another taken affirmative action to put that rate into effect, and there is no question on that, is there?

MR. SKLAR: I will agree that the publication of the rate sheet has the stamp of the Commission (44) on it. I will agree also that the Commission can regulate rates, yes, Mr. Cohen, I will agree to that. I will not agree, for several reasons which I explained, that there is meaningful and considered judgment entered in here in any way. If I simply want to take this statement which is included in the rate sheet that there is no charge for the exchange in none of the rate sheets, I would disagree with you because that is not what the facts of the case are.

MR. COHEN: We go to the fact as to whether or not as a matter of law, once the rate has been approved, and we agree there has to be an affirmative action in order for us to put it into effect, that is agree they can take the cost of our base as far as the exchange program is concerned, and they would have to agree a step further, I think. They can also order us to delete it from our rate if they take the cost out, they can order us to delete the exchange policy from our rate, but it means we lost state program at this point. We're wide open to antitrust from the state protection. So, there is no disagreement on that.

Now, the question of law is whether the Court has to find as a question of law that state action means a meaningful and considered action by the state (45) in terms of

whether or not as affirmative state action with respect to public utilities, assuming that there are — they are doing their job in conformance with an appropriate tariffs, whether the Court even has a right, really, I don't say this in a sharp critical sense, but in a legal sense to go behind the affirmative action and determine in each case as a question of fact whether or not the state has acted in a meaningful manner, and I suggest to the Court that as far as any court has gone so far at least in Parker v. Brown, the test is whether or not there was affirmative state action, not the fact that it was affirmative, but was it meaningful, but I grant it that meaningful and considered action by the state, I suggest to this Court that Parker has not gone that far and that the concept of Parker is eloquent to it, namely, that the antitrust laws do not effect state action and the purpose is not to have the Federal court have second guesses. Really what it boils down to is state regulatory agents, even though on some questions this might make sense from a general point of view, but in a legal sense.

THE COURT: I understand.

MR. COHEN: It is about the Federal (46) court in the second guesses business of state agency so at least as far as the very basic facts are concerned. We feel it brings it within at least the classic kind of Parker doctrine on the cases that have already been decided. This is taking all of the cases, not specifically the ones we picked out as being in our favor, but there are no cases that says it has to be meaningful and considered. It says there has to be state action, and we feel we should be granted a summary judgment on this part of the procedure.

Now, we didn't call our witness today. It makes some sense to take his testimony because he is supervisor of the Electricity Division of the Public Service Commission, and he has been involved in this thing for 14 years and he is going on a trip, namely to Yugoslavia, and I submit my client would not be returning for a few days. He has to catch a plane, he will be back in a week, so that if there is any question at all on what action the state, in fact takes relating to the meaningfulness of their, and the consideration

which they gave to the program, he will be available in about ten days to have his testimony taken.

THE COURT: Well, here's what goes through my mind, gentlemen: Mr. Sklar, I don't agree with (47) you that it is necessary for me to hear the entire case with all of its antitrust implications alleged in order to determine this issue. It may, however, be necessary for me to take some testimony, and that I propose to consider. What I will do is, I will review again the affidavits that have been filed, and based on the statements that have been made here by counsel, I will determine whether or not simply because you are entitled to all of the inferences that flow favorable to your position in view of the motions, an opportunity ought to be given to determine whether or not there are differences in the facts; and if so, permit such testimony as each side might want to submit with regard to that limited issue so that I can make a finding for the purpose of the motion and then proceed to disposition on it. I don't think that the law here is a significant of regulation, I'm not sure this is an arbitrary case, Mr. Sklar. I don't know. I'm somewhat bothered by the fact that you make the rather categorical assertion that the regulatory body isn't interested in the light bulb program and doesn't do anything about it. I don't know whether or not that's so. I wonder if this isn't the way to proceed. What do you think, Mr. Cohen?

MR. COHEN: I think it makes good (48) sense, your Honor.

THE COURT: Mr. Sklar?

MR. SKLAR: Certainly.

THE COURT: Why don't I make the inquiry in the light of your submissions here and on the papers that you have submitted. If I feel it's necessary after I look over the affidavits, I will have my clerk, Mr. Davis, get ahold of you and arrange for a suitable date for the taking of such testimony as you wish to submit on that issue.

MR. SKLAR: Your Honor, whether or not there should be a hearing, you will keep the depositions of the parties

as well? I recognize that perhaps that is a difficult, voluminous job, the depositions are part of the record?

THE COURT: I will not say no to you on that, but I'm going to ask for your assistance. I am sure that there is in the deposition more than a handful of areas where you would be in dispute, and I will ask you to submit to me what you can agree to that these depositions say.

MR. SKLAR: That's fine, your Honor.

THE COURT: Except in those areas where (49) you say that you are not able to, and there you can submit the specific pages of the depositions for me.

MR. SKLAR: Very well, your Honor.

THE COURT: What have you got, a dozen depositions?

MR. SKLAR: Three or four.

MR. COHEN: Probably two, and we have already quoted what we think would apply in our reply brief.

THE COURT: Anything else?

MR. SKLAR: No, your Honor.

THE COURT: Then the next word will be from me. Here is the order and opinion on the motion manufacturers here and you can get true copies of that from my clerk.

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VOLUME OF EXHIBITS

Exhibit "1" to Defendant's Answers to Interrogatories filed November 6, 1973, Being a List of Edison Agents who Distribute Light Bulbs.

AGENCIES	OFFICES
Adams Appliance	Ann Arbor
Biondi Appliance	Howell
Brose Electric Shop (Detroit)	Milan
Brose Electric Construction	Ypsilanti
Brose Electric Shop (Allen Pk.)	
Curto Robinson, Inc.	Monroe
Dasher Drugs	
DeRonne Hardware	Dearborn
Gambles Hardware (closed Jan. '73)	General Motors
Hamilton Hardware	Gratiot
Huron River Pharmacy	Hamtramck
Krzyszke Brothers	Highland Park
Livonia Hardware	Jefferson
Loeffler Hardware	Lincoln Park
Montgomery Wards	Michigan
Munro Distributing Co. (closed Sept '72)	Plymouth
Northville Hardware (opened Jan '73)	Redford
Rockwood Pharmacy	Third Avenue
Romulus Hardware	Washington Blvd.
Sentry Drugs	Wayne
Sleders Pharmacy	
Stears Hardware	Mt. Clemens
Dennis Grocery	Tech Plaza
Stephens Pharmacy	Roseville
	Utica
D & R Electric	
Gambles Store (Saline)	Birmingham
Gross Electric	Farmington
Hauck's Appliance (Whitmore Lake)	Milford
Keesler's	Northland

AGENCIES	OFFICES
Kitchen Korner	Pontiac
Leland Drug Store	Rochester
	Royal Oak
Goodnough's (Maybee)	Bad Axe
Hagen T.V. (Petersburg)	
Rushlow Drugs (Monroe)	Caro
Albie Hardware (Cass City)	Lapeer
Glasser's Market (Wisner)	
Henderson Drugs (Millington)	Marine City
Western Auto (Vassar)	Port Huron
Armada Ace Hardware	Sandusky
Harms Hardware	
Memphis Hardware	
Price Appliance	
Scheper Electric	
Servos Appliance	
Smith Pharmacy	
American Way Pharmacy (closed June '73)	
Bob's Hardware	
Crump Electric	
Gambles	
Gilliam's	
Hawthorne Electric (Birmingham)	
Hawthorne Electric (Walled Lake)	
Keasey Electric	
Uhan's (Pontiac)	
Village Dry Goods	

Exhibit "2" to Defendant's Answers to Interrogatories filed November 6, 1973, Being Edison's List of "Lamp Prices Paid".

EXHIBIT "2"
Lamp Prices Paid

	GENERAL ELECTRIC					WESTINGHOUSE			SYLVANIA		
LAMP SIZES	1969	1970	1971	1972	1973	1969	1970	1971	1969	1970	1971
25	.107	.107	.122	.117	.117	.25	.112	.117	.25	.28	.112
50/60	.107	.107	.119	.114	.114	.25	.108	.111	.25	.27	.105
75	.107	.107	.119	.114	.114	.25	.108	.111	.25	.27	.105
100	.107	.107	.119	.114	.114	.25	.108	.111	.25	.27	.105
50/150	.254	.254	.285	.273	.273	.59	.26	.270	.59	.61	.24
50/250	.296	.296	.337	.323	.323	.72	.316	.329	.72	.79	.436
150A	.142	.142	.163	.156	.156	.35	.152	.155	.35	.38	.148
200A	.164	.164	.181	.173	.173	.37	.16	.170	.37	.40	.16
100/300	.426	.426	.459	.440	.440	.99	.436	.440	.99	1.09	.436
100 RS	.194	.194	.199	.191	.191	.43	.172	.178	.43	.54	.18
300/IF Med	.254	.254	.275	.263	.263	.55	.24	.242	.55	.60	.24
300/IF Mog	.323	.323	.323	.340	.340	.75	.30	.330	.75	1.15	.30
500 IF	.494	.494	.495	.474	.474	1.20	.46	.518	1.20	1.15	.48
750	3.22	3.22	4.05	3.88	3.88	8.00	—	—	—	—	—
1000	3.65	3.65	4.25	4.07	4.07	8.50	—	—	—	—	—

These prices are subject to discounts as shown in Exhibit II.

Exhibit "3" to Defendant's Answers to Interrogatories filed November 6, 1973, Being a Statement of Edison's "Discounts and Payment Terms".

Discounts and Payment Terms

Discounts

	GENERAL ELECTRIC (Total Calendar Year Net Purchases Less Discount Allowed On Total Purchases)	WESTINGHOUSE	SYLVANIA
1969	Up to $ 400,000 - 0% $ 400,000 to 1,000,000 - 4% 1,000,000 to 1,250,000 - 5% 1,250,000 to 1,500,000 - 6% 1,500,000 to 2,000,000 - 7%	Quoted Prices Less 60%	Quoted Prices Less 57%
1970	Up to $ 400,000 - 0% $ 400,000 to 1,000,000 - 4% 1,000,000 to 1,350,000 - 5% 1,350,000 to 1,600,000 - 6% 1,600,000 and Up - 7%	Quoted Prices Less Dollar Volume Discount $ 0 to $250,000 251,000 to 500,000 501,000 to 750,000 751,000 to 1,000,000	Quoted Prices Less Dollar Volume Discount Less than $300,000 - 57% $300,000 - $600,000 - 58% $600,000 - $700,000 - 58.5% $700,000 - $800,000 - 59% $800,000 - $900,000 - 59.5% $900,000 and Up 61%
1971	Up to $ 400,000 - 0% $ 400,000 to 1,000,000 - 4% 1,000,000 to 1,350,000 - 5% 1,350,000 to 1,600,000 - 6% 1,600,000 to 1,900,000 - 7% 1,900,000 and Up - 8%	Quoted Prices Less Dollar Volume Discount $ 0 to $250,000 250,000 and Up	Net Quoted Prices
1972	Up to $ 400,000 - 0% $ 400,000 to 1,000,000 - 4% 1,000,000 to 1,350,000 - 5% 1,350,000 to 1,600,000 - 6% 1,600,000 to 1,900,000 - 7% 1,900,000 and Up - 8%	Net Quoted Prices	Net Quoted Prices
1973	Up to $ 400,000 - 0% $ 400,000 to 1,000,000 - 4% 1,000,000 to 1,350,000 - 5% 1,350,000 to 1,600,000 - 6% 1,600,000 to 1,900,000 - 7% 1,900,000 to 2,150,000 - 8% 2,150,000 to 2,400,000 - 9% 2,400,000 and Up - 10%	Quoted Prices Less Dollar Volume Discount 0 - 24% 25 - 49% 50 - 100%	Net Quoted Prices

Continued on Page 2

EXHIBIT "3" — Page 2

Prompt Cash Payment Terms

	General Electric	Westinghouse	Sylvania
1969	2%	Net	2%
1970	2%	2%	2%
1971	2%	2%	2%
1972	2%	2%	2%
1973	2%	2%	2%

Exhibit "4" to Defendant's Answers to Interrogatories filed November 6, 1973, Being Edison's "Customer Relations Routine Instruction".

Customer Relations Routine Instruction B-101
Page 1

Subject: *Lamp Supply Control Procedures*

Policy Ref: B-11, 12 and 13

Identification

Persons asking for lamp exchanges should be asked to present a recent electric bill or some other identification, unless the Customer Office Representative knows from past experience or personal knowledge that the person is entitled to lamp exchanges.

Customers Accounts must be called when a commercial customer presents identification other than an electric bill

to verify that the customer qualifies for lamp exchanges, and whenever KWHR information is needed.

It is our intention to furnish all the incandescent lamps a customer needs at any premises served on a rate which includes lamp exchanges. We should avoid making it difficult for customers to obtain the lamps they need and are entitled to. If he needs the lamps, we want him to obtain them with a minimum of inconvenience. The absence of an electric bill, by itself, is never sufficient reason to refuse to exchange lamps. Most customers will willingly tell us who they are and what their address is if we ask them for the information in a courteous and business-like manner.

Limits

The number of lamps exchanged should usually be limited to the quantities shown in Exhibit 1 attached. Old lamps not exchanged ought to be retained, but may be returned to the customer if he asks for them.

In those cases when the customer is furnished a lesser number of lamps than he presents, it may be helpful to explain that improvements in lamps occur frequently. Large supplies of extra lamps cause the customer to be deprived of the benefits of these improvements.

Form SA 242

• Form SA 242 must be prepared and signed by the customer, for all General Service Rate lamp exchanges and for Domestic Service exchanges involving 100 lamps or more. For Domestic exchanges of fewer than 100 lamps, either the SA 242, or a hand stamp noting the number of lamps exchanged on the customer's bill receipt, will be used. If the SA 242 is used in this situation, only the total number of lamps received and the customer's signature need be recorded.

In all exchanges involving 100 lamps or more, or when the transaction includes a full carton quantity of any one size, the customer's KWHR use as shown on his bill is to be noted on the form. When the customer uses other identification, the average KWHR use can be obtained from

Customers Accounts when the customer's rate is checked, and then noted on the form.

SA 242's for all General Service exchanges need to be retained until the lamp closing date each month, and then totalled so that the General Service exchanges can be reported to the Lamp Clerk in accordance with Customer Relations Routine Instruction B-100. The following SA 242's will then be forwarded to the Division or District office:

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• Indicates Revision

— those which are for a total of 100 lamps or more.
— those which include a full carton quantity of any one size.
— those for smaller quantities but for customers who sometimes exchange 100 lamps at one time, or who sometimes exchange carton quantities at one time.

Lampeterias

Offices using lampeterias will follow the same steps as outlined above at the counter before the customer selects his lamps. Then the customer should be given an appropriate size bag with the number of lamps he is to select marked on the bag.

Every opportunity should be used to assist customers in making their selections of lamps and to discuss good lighting practices with them.

Large Exchanges

• SA 242's for all exchanges of 100 lamps or more, or including a carton quantity of any one size, will be filed for a minimum of one year in the headquarters office of the Division or District in which the customer is located. Included in the file will be SA 242's for smaller quantities exchanged by customers who have multiple exchanges, any one of which may be for 100 lamps or include a carton quantity.

The file will be kept in address order. On the occasion of each exchange for any one account, the total number of lamps exchanged will be reviewed. If the number of lamps which have been exchanged appears to be excessive, an investigation will be made by a Customer Office supervisor or CBR. The intent of the investigation is to prevent excessive or fraudulent exchanges. Excessive or fraudulent exchanges • are to be billed to the customer. The Law Department should be consulted when we in the Sales Department are unable to resolve the situation or encounter difficulty with it.

Suspected Lamp Diversion

Special caution needs to be exercised to avoid exchanging lamps for use outside Detroit Edison territory. Persons living outside Detroit Edison territory may work in our area, or they may have accounts for business places or summer cottages on our lines. Care-of addresses will sometimes be a clue to the identity of these persons.

Supervisors of Customer Offices having this problem should, if they sense this problem exists, institute a local control on exchanges made by persons who are suspected of diverting lamps from our territory. SA 242's should be prepared for these transactions and bear the signature of the person receiving the lamps. The SA 242's should be retained in address order, so that subsequent exchanges by the same person will be recognized. A list of the addresses in the file might be kept at the counter for ready reference.

When and if exchanges for one address become excessive, the situation should be discussed with the customer, in the same manner as described above for • excessive exchanges. This local control will not be completely effective, but it will identify some fraudulent exchanges and tend to discourage the practice.

Issued: 12/12/66 *T.J.P.*
Supersedes: 8/5/64
• Indicates Revision

Letters of Authorization

General Service customers (usually chain stores, apartment buildings and office buildings) and apartments on the Domestic Service Rate sometimes find it inconvenient to present electric bills for identification because the bills are kept at main offices, or they must be removed from file. Some of them prepare a letter on their own stationery apthorizing an employe to exchange lamps. The employe presents the letter at a Customer Office each time an exchange is requested. This practice works well and should be encouraged.

When such a letter is first presented, Customers Accounts must be called to determine if the customer qualifies for lamp exchanges. If he does, the following information should be noted on the letter:

— average KWHR use
— rate
— office name
— date

The date and quantity of lamps exchanged will be noted or stamped on the letter at the time of each transaction and the letter returned to the customer's employe.

Each time the letter is presented, the Customer Office Representative should *first* take note of the date the letter has been verified with Customers Accounts. If this date is a year past, the account must be checked again and the same four items of information again placed on the letter.

As with all General Service exchanges and for Domestic Service exchanges involving 100 lamps or more, the customer's employe should sign an SA 242. The average KWHR use is to be noted on the SA 242 when exchanges total more than 100 lamps or include a carton quantity of any one size.

Agency Transactions

• Reports of lamp exchanges made by Service Agencies need to be closely scrutinized by the Company representative who services the agency to assure that the agent is observing the instructions in the manual for Customer Business Agencies.

First Supplies •

First supplies are furnished for newly constructed residences. The transaction will be recorded on an SA 242 and will be signed by the customer. Requests for lamps for more than one residence at one time will sometimes come from the builders; arrangments should be made for an electric living advisor to contact these builders to discuss their lighting needs.

Issued: 6/1/72
Supersedes: 12/12/66
• Indicates Revision

Added Supplies•

Domestic Service customers sometimes request lamps without old ones to exchange. If the situation warrants, the customer should be given a supply appropriate to their needs.

Electric Living Advisors

Electric Living Advisors sometimes recommend changes in lighting which require different wattages in existing fixtures or in added fixtures. These recommendations are made on Form SA 243 which is signed by the Advisor and left with the customer. When this form is presented at an office, the customer will be supplied with the recommended exchangeable sizes without charge. Old lamps need not be presented by the customer.

Primary and Large General Service Rate

Lamp exchange service is not furnished to customers or occupants of buildings served on the Primary rates and Large General Service rate. It is the responsibility of office personnel to identify those occupants or customers who are not entitled to exchange.

Issued: 6/1/72
Supersedes: 12/12/66
* Indicates Revision

Larger quantities, generally not exceeding 20, may be furnished to customers who have moved into a residence from which the lamps have been removed or whose lamps have been destroyed by fire. These are to be considered as "added supplies" and recorded on form SA 242, exactly the same as described above for "first supply." The SA 242's will be kept on file for a period of 90 days, for the same reason as for "first supplies."

Electric Living Advisors

Electric Living Advisors sometimes recommend changes in lighting which require different wattages in existing fixtures or in added fixtures. These recommendations are made on form SA 243 which is signed by the Advisor and left with the customer. When this form is presented at an office, the customer will be supplied with the recommended exchangeable sizes without charge. Old lamps need not be presented by the customer.

Residential Buildings on Primary Rate

Lamp exchange service is not furnished to occupants of buildings served on the Primary rate. Exhibit #2 attached lists some buildings on the Primary rate. This list may be helpful to customer office personnel.

(s) T. J. Peterson
T. J. Peterson

Issued: 12/12/66

LAMP EXCHANGE TABLE

Residential

Up to 200 KWHR per bi-monthly bill	10 lamps per year
300	15
400	18
500	22
600	25
700	28
800	30
900	32
1000	35

Commercial

KWHR Use Per Month	Lamps Per Year	KWHR Use Per Month	Lamps Per Year
100	6	2000	55
200	12	2500	68
300	16	3000	76
400	20	3500	90
500	24	4000	100
600	27	4500	112
700	29	5000	125
800	31	7500	160
900	33	10,000	190
1000	35	12,500	220

1100	37	15,000	250
1200	39	17,500	280
1300	41	20,000	310
1400	43	22,500	340
1500	45	25,000 and up	360

• These lamp tables are to be used only as guide lines during lamp transactions. They are not intended as limits during any one lamp exchange. Control of lamp passouts, it is hoped, will be achieved by limiting the number of lamps a customer secures at any one time.

Higher use customers (5000 KWHR and over) are restricted to approximately three month's supply of lamps at one time. More than 360 lamps should not normally be exchanged at one time.

Issued: 6/1/72
Supersedes: 5/8/67
• Indicates Revision

Exhibit "5" to Defendant's Answers to Interrogatories filed November 6, 1973, Being Edison Price List for Various Sized Bulbs.

LAMP RELEASE-S

PRICE-(EA)

PRICE-(EA)

	INCANDESCENT						
2/.68			24	2.59			12
.45			12	2.60			12
.45			12	2.60			12
.69			12	5.75			1
.69			12		FLAIR		
.69			12	.69			12
2/1.16			24	.79			12
2/1.16			24	.79			12
.92			12	.79			12
.64			24	.69			12
.69			24	.79			12
.92			24	.79			12
.28			12	.89			12
2/.58			12	.57			12
.41			12	.69			12
.41			12	.69			12
.41			12				
.37			12	.79			12
.99			6	.79			12
1.16			6	.57			12
.69			12	.69			12
.36			24	.69			12
.89			12				
1.02			12	.79			12
				.89			12
.52			24	.79			12
.37			24	.89			12
.52			24	.79			12
.52			24	.79			12
.52			24	.89			12
.52			24				
.52			24		FLUORESCENT		
1.39			12	2.25			6
2.25			6	2.20			6
				2.25			6
1.95			6	2.25			6
1.51			24	2.80			6
1.51			24	1.65			6
1.60			24	4.65			12
1.60			24	4.90			12
1.89			6				
3.80			6	2.79			12
11.89			6	2.98			12
3.45			12				
3.45			12				
3.45			12				
3.45			12				
2.59			12		TOTAL PAGE(S)		

THE DETROIT EDISON COMPANY

11/4/73

BEST COPY AVAILABLE

Exhibit #1-A to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being the Detroit Edison Explanation of its Franchises as filed with the MPSC.

THE DETROIT EDISON COMPANY FRANCHISES

(Filed February 8, 1944)

The Detroit Edison Company is operating under the terms of local franchises granted to it or to its predecessors or assignors by the various municipalities and townships in which it is doing business. Copies of these local franchises follow this statement.

The Company also refers to all such rights, privileges and franchises as it, its predecessors and assignors, have or are entitled to under or by virtue of the Statutes of the State of Michigan.

In the Detroit and Eastern Michigan Divisions none of the local franchises specify definite rates. The majority state that the rates shall not be greater than the current rates charged for similar service at the time in force in the City of Detroit. A few specify rates similar to those in effect in other cities served by the Company, such as Ann Arbor, Mt. Clemens, etc. Many of the local franchises make no reference to rates.

The Detroit Edison Company is operating in the City of Detroit under an ordinance of the Common Council of the City of Detroit entitled, "An Ordinance authorizing the Edison Illuminating Company of Detroit, its successors and assigns to lay pipes, mains, conductors, and service pipes in the streets, avenues, and alleys in the City of Detroit," approved by the Mayor, July 13th, 1886; the supplement to the same approved November 19th, 1889; and the amendment approved June 5th, 1915; copies of which ordinance, supplement and amendment follow this statement. It is also operating in the City of Detroit under and by virtue of an ordinance of the Common Council of the City of De-

troit, entitled, "An Ordinance authorizing and regulating for the purpose of supplying light, the erection, laying and operating poles, mains, wires, pipes, lamps and conductors in the public streets, alleys and other public places of the City of Detroit, by the Brush Electric Light Company of said city," approved by the Mayor, March 18th, 1882, and the amendments thereof; copies of which ordinance and amendments follow this statement.

The Detroit Edison Company is the successor and assignee of the Detroit Electric Light and Power Company, and of the Edison Electric Light Company of Detroit, and of The Excelsior Electric Light Company of Detroit, to whom, at different times, the City of Detroit has, by ordinance, granted consent to their occupation of the streets; but The Detroit Edison Company has at no time professed to do business under these ordinances.

The Company also refers to ordinances of villages and townships, whose territory, or some part thereof, has subsequently been annexed to the City of Detroit, granting to the Company the right to occupy the streets in such territory subsequently annexed, so far as these ordinances may be applicable.

In the Lake Huron Division all franchises make no reference to rate agreements with the exception of franchise granted in the City of Bad Axe; franchise granted in the Village of Kinde; franchise granted in the Village of Pigeon, all in Huron County; franchise granted in the Village of Clifford, in Lapeer County; franchise granted in Township of Denmark to Southern Michigan Light & Power Company and franchise granted in the Village of Reese, both in Tuscola County, Michigan.

The clause with reference to rates, which appears in the franchise granted by the City of Bad Axe, states that the rates charged by the grantee, his successors and assigns, shall not be in excess of the rates charged in April 1920 by the City of Bad Axe.

The clause with reference to rates, which appears in the franchise granted by the Village of Kinde, states that the

current rate charged for residence and commercial lighting shall not exceed the rates charged for similar service in the City of Bad Axe.

The clause with reference to rates, which appears in the franchise granted by the Village of Pigeon, states that the current rate charged for residence and commercial lighting shall not exceed the rates charged for similar service in the City of Bad Axe.

The clause with reference to rates, which appears in the franchise granted by the Village of Clifford specifies that rates for residence lighting, commercial lighting, and power shall be the Company's standard rates.

The clause with reference to rates, which appears in the franchise granted by the Township of Denmark, specifies maximum rates which are higher than the Company's standard rates.

The clause with reference to rates, which appears in the franchise granted by the Village of Reese, specifies maximum rates which are higher than the Company's standard rates.

This statement was made as of November 1, 1936.

Exhibit #1-B to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being Franchise Issued to Detroit Edison by the City of Inkster on July 17, 1972.

CITY OF INKSTER

Wayne County, Michigan

Granted To
THE DETROIT EDISON COMPANY
July 17, 1972

THE CITY OF INKSTER ORDAINS:

SECTION 1. Permission is hereby granted to THE DETROIT EDISON COMPANY, incorporated under the laws of the States of Michigan and New York, its successors and assigns, to construct, maintain and operate in the public streets, highways, alleys and other public places in the City of Inkster, Wayne County, Michigan, all needful and proper poles, towers, mains, wires, pipes, conduits and all such lines and other apparatus requisite for the transmission, transforming and distribution of electricity for public and private use, and to transact a local electric business within said City, subject, however, to all conditions and restrictions hereinafter contained.

SECTION 2. The conditions of the foregoing are as follows:

A — The grantee shall do no injury to any street, highway, alley or other public place, or to any shade trees, or in any manner disturb or interfere with any water or gas pipes, or with any public or private sewer, now or hereafter laid or constructed by any authorized person or corporation.

B — The City may, in its discretion, grant permission for the trimming of trees when necessary to make the lines safe and accessible, such trimming to be done under its supervision.

C — The construction of the said lines shall be in accordance with the rules and regulations of the Michigan Public Service Commission or its successor.

D — The said grantee, before entering upon any street, highway, alley or other public place for the purpose of erecting and constructing any poles, mains, wires, pipes, conduits, or other apparatus, shall in writing notify the City or its representatives of the proposed construction, and shall, if the City so requires, file with them a sufficient plan and specification, showing the nature and extent of the proposed erection and construction.

E — No street, highway, alley or public place shall be allowed or remain open or encumbered by the construction work of the said grantee for a longer period than shall be necessary to execute the said work, and the grantee shall at all times conform to all ordinances of the City, now or hereafter in force, relative to the fencing and lighting of obstructions and excavations.

F — The grantee shall save the City harmless from any judgment that may be recovered against the City by reason of the wrongdoing or negligence of the said grantee in the erection and maintenance of said poles, mains, wires and other apparatus or construction.

G— Said grantee shall make due provision upon forty-eight hours' notice in writing by raising its wires or otherwise, for the passage of any barn, building or other structure on or over any street, highway, or public place occupied by the mains, wires, poles and apparatus of said grantee.

H — This franchise is not exclusive.

Printed April, 1973

City of Inkster
The Detroit Edison Company

SECTION 3. In consideration of the granting of this franchise, grantee agrees that its rates and charges for electric service in the City of Inkster shall not exceed its rates and charges for like service elsewhere in its service area, evidenced by its uniform rate schedules at the time on file with and approved by the Michigan Public Service Commission. It is understood that the grantee is subject to regulation by the Michigan Public Service Commission and that any order, rule, or regulation by that Commission, or its successor, will prevail over any regulation herein contained or provided for in case of conflict.

SECTION 4. This grant shall take effect if said grantee shall, within fifteen days from the date of the passage of this ordinance, file with the City Clerk its written acceptance of the terms of the same, and upon the confirmation of this grant, by the affirmative vote of three-fifths of the electors of said City, voting thereon at a regular election to be held on Tuesday, the 7th day of November, 1972, as provided for by the Statutes and the State Constitution.

If not confirmed by the electors voting at said election, this ordinance shall be null and void.

SECTION 5. This Franchise and Ordinance shall be and remain in force for thirty (30) years from and after the date of its confirmation by the electors of the CITY OF INKSTER, Wayne County, Michigan.

SECTION 6. Nothing in this grant shall be construed to alienate the title of the public in and to any street, highway, alley or public place or any portion thereof, neither shall anything herein be construed in any manner as a surrender by the CITY OF INKSTER of its legislative power with respect to the subject matter hereof, or with respect to any other matter whatsoever; nor as in any manner limiting the right of the said CITY OF INKSTER to lawfully regulate the use of any street, avenue, highway, or public place within its jurisdiction.

SECTION 7. The City of Inkster shall have the right at any time to terminate this franchise and purchase in its entirety the property of the grantee, its successors or assigns, within said City at a price to be agreed upon, determined by arbitration as follows: One arbitrator shall be appointed by said City, one arbitrator shall be appointed by the grantee, and the two arbitrators so appointed shall select by agreement the third arbitrator, and the unanimous determination by said arbitrators of the price to be paid shall be binding upon both the City and the grantee, its successors and assigns, and upon payment of such purchase price by the City to the grantee, its successors or assigns, the City shall become and be entitled to a deed and bill of sale of the property so purchased. Upon such sale to the

City this franchise shall be surrendered at no cost to the City. Nothing in this ordinance shall prevent the City from acquiring the property of any such utility by condemnation proceedings or in any other lawful mode.

Dated this 17th day of July, 1972.

(Signed) Edward Bivens, Jr.
Mayor

(Signed) Betty G. Miller
City Clerk

Printed April, 1973

City of Inkster
The Detroit Edison Company

I hereby certify that the above and foregoing is a true and correct copy of a franchise granted by ordinance to THE DETROIT EDISON COMPANY, at a regular meeting of the City Council of the CITY OF INKSTER, Wayne County, Michigan, held on Monday, the 17th day of July, 1972, said franchise to take effect upon its confirmation by the electors of said City as provided for in Section 4 thereof.

(Signed) Betty G. Miller
City Clerk

(Copied from signed and certified copy of Ordinance in files of The Detroit Edison Company.)

Ordinance Adopted by the City Council, July 17th, 1972, as certified by City Clerk (Betty G. Miller), in signed and certified copy of Ordinance in files of The Detroit Edison Company.

Written Acceptance Filed (subject to the confirmation of Grant by electors) with City Clerk (dated July 17th, 1972) as certified by City Clerk, Betty G. Miller. (Signed

and certified copy of Acceptance in files of The Detroit Edison Company.)

Grant Confirmed by Electors, November 7th, 1972, as certified by City Clerk, Betty G. Miller. (Signed statement of Election Returns in files of The Detroit Edison Company.)

Written Acceptance Filed with City Clerk (dated November 7th, 1972) as certified by City Clerk, Betty G. Miller. (Signed and certified copy of Acceptance in files of The Detroit Edison Company.)

Printed April, 1973.

Exhibit #1 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a multipage exhibit setting out all rate sheets filed with the Michigan Public Service Commission, or its predecessor agencies, showing the lamp supply or exchange clause. These documents were covered by Interrogatory No. 9 and described in the depositions as Plaintiff's Deposition Exhibit #4.

Defendant's Answer to
Interrogatory No. 9

Attached are copies of all rate sheets filed with the Michigan Public Service Commission, or its predecessor agencies, showing the lamp supply or exchange clause.

M.P.S.C. No. 7 . Original Sheet No. B5

RULES AND REGULATIONS—Continued

B-5.1 SERVICE CONNECTIONS—All wiring upon the customer's premises shall be brought by the customer to any suitable point of service specified by the Company. Only one service connection is installed to a building or group of buildings including adjacent service areas under a single ownership except where separate service is required for disturbing use of service or where in the judgment of the Company additional services are necessary or desirable for operating reasons or because of the requirements of public safety. Detailed specifications for service connections will be furnished upon request at any customer business office.

B-5.2 CUSTOMER'S INSTALLATION—All wiring on the customer's premises shall be installed and maintained in accordance with applicable laws and the rules of the governmental authority having jurisdiction, the National Electrical Code and the rules of the Company.

The customer shall provide, free of expense to the Company, a suitable place for the meter or meters and any other supply, protective or control equipment of the Company which may be required in the delivery of the service.

B-5.3 COMPANY EQUIPMENT ON CUSTOMER'S PROPERTY—The Company will keep in repair and maintain its own property installed on the premises of the customer. All equipment supplied by the Company shall remain its exclusive property, and the Company shall have the right to remove the same from the premises of the customer at any time after the termination of service from whatsoever cause.

The customer shall be responsible for the safekeeping of the Company's property and shall not permit any person except an authorized Company representative to break any seals upon, or do any work on, any meter or other apparatus of the Company located on the customer's premises.

B-5.4 ACCESS TO PREMISES—As a condition of taking service, authorized employes and agents of the Company shall have access to the customer's premises at all reasonable hours to install, inspect, read, repair or remove its meters, and to install, operate and maintain other Company property, and to inspect and determine the connected electrical load. Authorized employes and agents shall carry identification furnished by the Company and shall display it upon request.

B-5.5 LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company lines, in such quantities as may be needed for all permanent fixtures.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under the applicable rate.

FILED
SEP 7 1972

Issued: August 18, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910.

M.P.S.C. No. 7 Original Sheet No. D1

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire. Where available, and the demand justifies, three-phase, four-wire, delta connected service may be had at 120/240 volts nominally.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.80¢ per kilowatthour for the next 100 kilowatthours,
2.60¢ per kilowatthour for the next 300 kilowatthours, and
2.40¢ per kilowatthour for the excess kilowatthours.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: See Schedule Designation B-5.5.

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

FILED
SEP. 7 1972

Issued: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910.

BEST COPY AVAILABLE

Exhibit "1"

M.P.S.C. No. 7 — Original Sheet No. D2

DOMESTIC SPACE HEATING RATE

AVAILABILITY OF SERVICE: Available on an optional basis for customers desiring service for all domestic purposes only to a single occupancy or dwelling unit including farm dwellings in which all of the space heating is supplied by electric service through the same meter and is installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire. Where available, and the demand justifies, three-phase, four-wire, delta connected service may be had at 120/240 volts nominally.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.80¢ per kilowatthour for the next 100 kilowatthours,
2.60¢ per kilowatthour for the next 300 kilowatthours,
2.40¢ per kilowatthour for the next 500 kilowatthours, and
1.75¢ per kilowatthour for the excess kilowatthours.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: See Schedule Designation B-5.5.

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910.

Exhibit "1"

M.P.S.C. No. 7 — Original Sheets No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate, nor to installations having a demand of over 1000 kilowatts not taking service on this rate prior to the effective date below.

The 1000 kilowatt limitation may be waived for the following cases:

1. For temporary installations where the customer pays the "in and out" charges.
2. For Primary Supply installations during construction while the building is under jurisdiction of the contractor.

Standby service not available under this rate.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
4.50¢ per kilowatthour plus fuel adjustment for the next 85 kilowatthours,
3.80¢ per kilowatthour plus fuel adjustment for the next 900 kilowatthours,
2.80¢ per kilowatthour plus fuel adjustment for the next 9,000 kilowatthours, and
2.20¢ per kilowatthour plus fuel adjustment for the excess kilowatthours.

FUEL ADJUSTMENT: See Schedule Designation B-4.6.

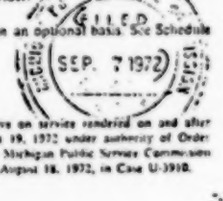
DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month, less 3% discount for prompt payment.

LAMP SUPPLY: See Schedule Designation B-5.5 (2).

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, or where the investment to serve is out of proportion to the revenue derived therefrom, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.



Issued: August 19, 1972
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910.

M.P.S.C. No. 6 — *Second* Revised Sheet No. D1

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.80¢ per kilowatthour for the next 100 kilowatthours,
2.35¢ per kilowatthour for the next 300 kilowatthours, and
2.20¢ per kilowatthour for the excess *kilowatthours*.

DISCOUNT: 5% for prompt payment.

MINIMUM CHARGE: *$1.50* per month less 5% for prompt payment.

LAMP SUPPLY: See Lamp Supply, Schedule Designation B-5.5.

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

FILED
APR 5 1972

Issued: *April 3, 1972*
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *March 31, 1972*, under authority of Order of the Michigan Public Service Commission dated *March 30, 1972*, in Case *U-3910*.

M.P.S.C. No. 6 — *Second* Revised Sheet No. D2

ALL-ELECTRIC DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available on an optional basis to customers desiring service for all domestic purposes to a single occupancy or dwelling unit including farm dwellings in which the space heating is supplied by electric service installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.80¢ per kilowatthour for the next 100 kilowatthours,
3.35¢ per kilowatthour for the next 300 kilowatthours,
2.20¢ per kilowatthour for the next *300* kilowatthours, and
1.70¢ per kilowatthour for the excess *kilowatthours*.

DISCOUNT: 5% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 5% for prompt payment.

LAMP SUPPLY: See Lamp Supply, Schedule Designation B-5.5.

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

FILED
APR 5 1972

Issued: *April 3, 1972*
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *March 31, 1972*, under authority of Order of the Michigan Public Service Commission dated *March 30, 1972*, in Case *U-3910*.

Exhibit "1"

M.P.S.C. No. 6 — *Second* Revised Sheet No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate, *nor to installations having a demand of over 500 kilowatts not taking service on this rate on* the effective date below. Standby service not available under this rate.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
4.50¢ per kilowatthour *plus fuel adjustment* for the next 85 kilowatthours,
3.75¢ per kilowatthour *plus fuel adjustment* for the next 900 kilowatthours,
2.70¢ per kilowatthour plus fuel adjustment for the next 9,000 kilowatthours, and
2.15¢ per kilowatthour plus fuel ajdustment for the excess *kilowatthours*.

FUEL ADJUSTMENT: See Fuel Adjustment Clause, Schedule Designation B-4.6.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month, less 3% discount for prompt payment.

LAMP SUPPLY: See Lamp Supply, Schedule Designation B-5.5 (2).

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: *April 3, 1972*
By R. W. Hartwell,
Executive Vice President for Finance
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *March 31, 1972*, under authority of Order of the Michigan Public Service Commission dated *March 30, 1972*, in Case *U-3910*.

Exhibit "1"

M.P.S.C. No. 6 — *First Revised* Sheet No. B5

RULES AND REGULATIONS—Continued

B-5.1 **SERVICE CONNECTIONS**—All wiring upon the customer's premises shall be brought by the customer to any suitable point of service specified by the Company. Only one service connection is installed to a building or group of buildings including adjacent service areas under a single ownership except where separate service is required for disturbing use of service or where in the judgment of the Company additional services are necessary or desirable for operating reasons or because of the requirements of public safety. Detailed specifications for service connections will be furnished upon request at any customer business office.

B-5.2 **CUSTOMER'S INSTALLATION**—All wiring on the customer's premises shall be installed and maintained in accordance with applicable laws and the rules of the governmental authority having jurisdiction, the National Electrical Code and the rules of the Company.

The customer shall provide, free of expense to the Company, a suitable place for the meter or meters and any other supply, protective or control equipment of the Company which may be required in the delivery of the service.

B-5.3 **COMPANY EQUIPMENT ON CUSTOMER'S PROPERTY**—The Company will keep in repair and maintain its own property installed on the premises of the customer. All equipment supplied by the Company shall remain its exclusive property, and the Company shall have the right to remove the same from the premises of the customer at any time after the termination of service from whatsoever cause.

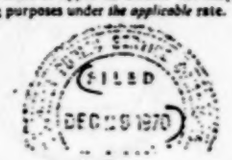
The customer shall be responsible for the safekeeping of the Company's property and shall not permit any person except an authorized Company representative to break any seals upon, or do any work on, any meter or other apparatus of the Company located on the customer's premises.

B-5.4 **ACCESS TO PREMISES**—As a condition of taking service, authorized employes and agents of the Company shall have access to the customer's premises at all reasonable hours to install, inspect, read, repair or remove its meters, and to install, operate and maintain other Company property, and to inspect and determine the connected electrical load. Authorized employes and agents shall carry identification furnished by the Company and shall display it upon request.

B-5.5 **LAMP SUPPLY:** Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under *the applicable* rate.



Issued: *December 23, 1970*
By R. W. Hartwell, Executive Vice President
for Finance and Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *January 4, 1971*, under authority of Order of the Michigan Public Service Commission dated *December 21, 1970*, in Case *U-3697*.

BEST COPY AVAILABLE

Exhibit "1"

M.P.S.C. No. 6 — *First Revised* Sheet No. D1

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours *or less,*
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.80¢ per kilowatthour for the next *100* kilowatthours,
2.10¢ per kilowatthour for the next *300* kilowatthours, and
1.90¢ per kilowatthour for the excess.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: *See Lamp Supply, Schedule Designation B-3.5.*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

MICHIGAN PUBLIC SERVICE COMMISSION FILED DEC 29 1970

Issued: December 23, 1970
By R. W. Hartwell, Executive Vice President
for Finance and Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *January 4, 1971*, under authority of Order of the Michigan Public Service Commission dated *December 21, 1970*, in Case U-3697.

Exhibit "1"

M.P.S.C. No. 6 — *First Revised* Sheet No. D2

ALL-ELECTRIC DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available on an optional basis to customers desiring service for all domestic purposes through one meter to a single occupancy or dwelling unit including farm dwellings in which the space heating and water heating are supplied by electric service installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.80¢ per kilowatthour for the next 100 kilowatthours,
2.10¢ per kilowatthour for the next 300 kilowatthours,
1.90¢ per kilowatthour for the next 300 kilowatthours, and
1.50¢ per kilowatthour for the excess.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: *See Lamp Supply, Schedule Designation B-3.5.*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

MICHIGAN PUBLIC SERVICE COMMISSION FILED DEC 29 1970

Issued: December 23, 1970
By R. W. Hartwell, Executive Vice President
for Finance and Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *January 4, 1971*, under authority of Order of the Michigan Public Service Commission dated *December 21, 1970*, in Case U-3697.

Exhibit "1"

M.P.S.C. No. 6 — *First Revised* Sheet No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate. Standby service not available under this rate.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours, *or less,*
4.50¢ per kilowatthour for the next 85 kilowatthours,
3.50¢ per kilowatthour for the next 900 kilowatthours,
2.50¢ per kilowatthour plus fuel adjustment for the next 9,000 kilowatthours, and
2.00¢ per kilowatthour plus fuel adjustment for the excess.

FUEL ADJUSTMENT: See Fuel Adjustment Clause, Schedule Designation B-4.6.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month, less 3% discount for prompt payment.

LAMP SUPPLY: *See Lamp Supply, Schedule Designation B-5.3(2).*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: *December 23, 1970*
By R. W. Hunnell, Executive Vice President
for Finance and Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *January 4, 1971,* under authority of Order of the Michigan Public Service Commission dated *December 31, 1970,* in Case U-3697.

Exhibit "1"

M.P.S.C. No. 6 — *First Revised* Sheet No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate. Standby service not available under this rate.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours, *or less,*
4.50¢ per kilowatthour for the next 85 kilowatthours,
3.50¢ per kilowatthour for the next 900 kilowatthours,
2.50¢ per kilowatthour plus fuel adjustment for the next 9,000 kilowatthours, and
2.00¢ per kilowatthour plus fuel adjustment for the excess.

FUEL ADJUSTMENT: See Fuel Adjustment Clause, Schedule Designation B-4.6.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month, less 3% discount for prompt payment

LAMP SUPPLY: *See Lamp Supply, Schedule Designation B-5.3(2).*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: *December 23, 1970*
By R. W. Hunnell, Executive Vice President
for Finance and Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after *January 4, 1971,* under authority of Order of the Michigan Public Service Commission dated *December 31, 1970,* in Case U-3697.

Exhibit "1"

M.P.S.C. No. 5

Second Revised Sheet No. D1
(Revision in Rates)

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

5.85¢ per kilowatthour for the first 15 kilowatthours,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.75¢ per kilowatthour for the next 150 kilowatthours,
2.25¢ per kilowatthour for the next 150 kilowatthours,
2.00¢ per kilowatthour for the next 150 kilowatthours, *and*
1.50¢ per kilowatthour for the excess.

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUN 7 1967

***Controlled** Water Heating Service:*

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such servi , is controlled by timer or monitoring device to not less than 20 hours per day, said hours to be established from time to time by the Company. A rate of 0.8¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	*500 kilowatthours*
80 gallon tank	*700 kilowatthours*
110 gallon tank	*900 kilowatthours*

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: *$1.50 per month less 3% for prompt payment.*

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

Issued: June 1, 1967
By E. H. Scott, Senior Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on bills rendered pursuant to meter readings on and after May 31, 1967, under authority of Order of the Michigan Public Service Commission dated May 4, 1967, in Case U-2731.

Exhibit "1"

M.P.S.C. No. 5

First Revised Sheet No. D1.1
(Withdrawn for New Business)

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter. *This rate is withdrawn for new business on and after May 31, 1967.*

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

5.85¢ per kilowatthour for the first 15 kilowatthours,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.75¢ per kilowatthour for the next 150 kilowatthours,
2.25¢ per kilowatthour for the next 150 kilowatthours,
2.00¢ per kilowatthour for the next 150 kilowatthours, *and*
1.50¢ per kilowatthours for the excess.

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUN 13 1967

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: 75¢ per month less 3% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

Issued: June 1, 1967
By E. H. Scott, Senior Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on bills rendered pursuant to meter readings on and after May 31, 1967, under authority of Order of the Michigan Public Service Commission dated May 4, 1967, in Case U-2731.

Exhibit "1"

M.P.S.C. No. 5

First Revised Sheet No. D2
(Revision in Rates)

ALL-ELECTRIC DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available on an optional basis to customers desiring service for all domestic purposes through one meter to a single occupancy or dwelling unit including farm dwellings in which the space heating and water heating are supplied by electric service installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.5¢ per kilowatthour for the next 85 kilowatthours,
2.5¢ per kilowatthour for the next 100 kilowatthours,
2.0¢ per kilowatthour for the next 300 kilowatthours,
1.5¢ per kilowatthour for the next 300 kilowatthours, and
1.35¢ per kilowatthour for the excess.

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUN 7 1967

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is controlled by timer or monitoring device to not less than 20 hours per day, said hours to be established from time to time by the Company. A rate of 0.8¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	*500 kilowatthours*
80 gallon tank	*700 kilowatthours*
110 gallon tank	*900 kilowatthours*

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(I) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.

(II) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

Issued: June 1, 1967
By E. H. Scott, Senior Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on bills rendered pursuant to meter readings on and after May 31, 1967, under authority of Order of the Michigan Public Service Commission dated May 4, 1967, in Case U-2731.

Exhibit "1"

M.P.S.C. No. 5

First Revised Sheet No. D3
(Revision in Rates)

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate. No standby service.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

An energy charge per kilowatthour of

5.25¢ for the first 15 kilowatthours,
4.50¢ for the next 85 kilowatthours,
3.50¢ for the next 900 kilowatthours,
2.50¢ plus fuel adjustment for the next 9000 kilowatthours, and
2.00¢ plus fuel adjustment for the excess.

MICHIGAN PUBLIC SERVICE COMMISSION FILED MAY 31 1967

The fuel adjustment shall consist of an additional .0012¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu or a reduction of .0012¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is controlled by timer or monitoring device to not less than 20 hours per day, said hours to be established from time to time by the Company. A rate of 0.8¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	*500 kilowatthours*
80 gallon tank	*700 kilowatthours*
110 gallon tank	*900 kilowatthours*

(Continued on next sheet)

Issued: June 1, 1967
By E. H. Scott, Senior Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on bills rendered pursuant to meter readings on and after May 31, 1967, under authority of order of the Michigan Public Service Commission dated May 4, 1967, in Case U-2731.

M.P.S.C. No. 3

First Revised Sheet No. D2a
(Revision in Units)

GENERAL SERVICE RATE—Continued

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: *$1.50 per month, less 3% discount for prompt payment.*

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished without extra charge in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

FILED
MAY 31 1967

Issued: June 1, 1967
By E. H. Scott, Senior Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on bills rendered pursuant to meter readings on and after May 31, 1967, under authority of Order of the Michigan Public Service Commission dated May 4, 1967, in Case U-2731.

M.P.S.C. No. 3

First Revised Sheet No. D1

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

5.85¢ per kilowatthour for the first 15 kilowatthours,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.75¢ per kilowatthour for the next 150 kilowatthours,
2.25¢ per kilowatthour for the next 150 kilowatthours,
2.00¢ per kilowatthour for the next 150 kilowatthours,
1.60¢ per kilowatthour for the next 200 kilowatthours, and
1.50¢ per kilowatthours for the excess.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is controlled by a clock or other timing device to 20 hours per day, said hours to be established from time to time by the Company. A rate of 1.0¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	400 kilowatthours
80 gallon tank	550 kilowatthours
110 gallon tank	700 kilowatthours

See Schedule Designation D2 for optional Water Heating Rate.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: 75¢ per month less 3% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

FILED
DEC 1 1965

Issued: December 1, 1965
By E. H. Scott, Senior Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after December 1, 1965, under authority of Order of the Michigan Public Service Commission dated November 4, 1965, in Case U-2139.

M.P.S.C. No. 5 — Original Sheet No. D1

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

5.85¢ per kilowatthour for the first 15 kilowatthours,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.75¢ per kilowatthour for the next 150 kilowatthours,
2.25¢ per kilowatthour for the next 250 kilowatthours, and
1.60¢ per kilowatthour for the excess.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is controlled by a clock or other timing device to 20 hours per day, said hours to be established from time to time by the Company. A rate of 1.0¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	400 kilowatthours
80 gallon tank	550 kilowatthours
110 gallon tank	700 kilowatthours

See Schedule Designation D2 for optional Water Heating Rate.

DISCOUNT: 5% for prompt payment.

MINIMUM CHARGE: 75¢ per month less 5% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

Issued: December 1, 1961
By E. H. Scull, Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after December 1, 1961, under authority of Order of the Michigan Public Service Commission dated November 12, 1961 in Case U-4790.

M.P.S.C. No. 5 — Original Sheet No. D1.1

ALL-ELECTRIC DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available on an optional basis to customers desiring service for all domestic purposes through one meter to a single occupancy or dwelling unit including farm dwellings in which the space heating and water heating are supplied by electric service installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Energy Charge:

$1.50 which shall include 15 kilowatthours or less,
3.5¢ per kilowatthour for the next 85 kilowatthours,
2.5¢ per kilowatthour for the next 100 kilowatthours,
2.0¢ per kilowatthour for the next 300 kilowatthours, and
1.5¢ per kilowatthour for the excess.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is controlled by a clock or other timing device to 20 hours per day, said hours to be established from time to time by the Company. A rate of 1.0¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	400 kilowatthours
80 gallon tank	550 kilowatthours
110 gallon tank	700 kilowatthours

See Schedule Designation D2 for optional Water Heating Rate.

DISCOUNT: 5% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 5% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

Issued: December 1, 1961
By E. H. Scull, Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after December 1, 1961, under authority of Order of the Michigan Public Service Commission dated November 12, 1961 in Case U-4790.

M.P.S.C. No. 5 — Original Sheet No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate. No standby service.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire; or three phase four-wire, delta connected at 120/240 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

An energy charge per kilowatthour of

5.15¢ for the first 100 kilowatthours,
4.15¢ for the next 300 kilowatthours,
2.65¢ plus fuel adjustment for the next 4100 kilowatthours,
2.30¢ plus fuel adjustment for the next 5000 kilowatthours, and
2.06¢ plus fuel adjustment for the excess.

The fuel adjustment shall consist of an additional .0032¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.8¢ per million Btu or a reduction of .0032¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.8¢ per million Btu. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overland charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 3% discount for prompt payment.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished without extra charge in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

Issued: December 1, 1961
By E. H. Swift, Vice-President & Controller
2000 Second Ave., Detroit, Michigan 48226

Effective on meter readings on and after December 1, 1961, under authority of Order of the Michigan Public Service Commission dated November 27, 1961, in Case U-4296.

include with page

M.P.S.C. No. 4 — Original Sheet No. D1. 1

ALL-ELECTRIC DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available on an optional basis to customers desiring service for all domestic purposes through one meter to a single occupancy in which the space heating and water heating are supplied by electric service installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120-240 volts, three wire.

MICHIGAN PUBLIC SERVICE COMMISSION FILED OCT 17 1963

RATE PER MONTH:

Energy Charge:

$1.50 per month which shall include 15 kilowatthours or less,
3.5¢ per kilowatthour for the next 85 kilowatthours,
2.5¢ per kilowatthour for the next 100 kilowatthours,
2.0¢ per kilowatthour for the next 300 kilowatthours, and
1.4¢ per kilowatthour for the excess.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is limited by a clock or other timing device to 20 hours per day, said hours to be established from time to time by the Company. A rate of 1.0¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	400 kilowatthours
80 gallon tank	550 kilowatthours
110 gallon tank	700 kilowatthours

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residence connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections.

Issued: October 3, 1963
By Walter L. Cisler, President
2000 Second Ave., Detroit 26, Michigan

Effective October 3, 1963, under authority of Order of the Michigan Public Service Commission dated October 3, 1963, in Case U-3418.

M.P.S.C. No. 4

Seventh Revised Sheet No. D1
Cancels Sixth Revised Sheet No. D1
(Adding New Excess Step)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, poultry houses and other minor farm buildings.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor to those greenhouses, hatcheries, dairies or other enterprises which do a commercial business.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120 volts, two-wire, or 120-240 volts, three-wire; or three phase four-wire, delta connected at 120-240 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUN 3 1959

RATE PER RESIDENCE PER MONTH:

6¢ per kilowatthour for the first 15 kilowatthours,
4.50¢ per kilowatthour for the next 35 kilowatthours,
2.75¢ per kilowatthour for the next 200 kilowatthours,
2.25¢ per kilowatthour for the next 500 kilowatthours, and
2.00¢ per kilowatthour for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at 6¢, 4.50¢, 2.75¢ and 2.25¢ are twice the stated monthly quota.

DISCOUNT: 5% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service: 75¢ per month, less 5% for prompt payment. For three phase service: $10.00 per month, less 5% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residence connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections.

Issued: June 1, 1939
By Walter L. Cisler, President
2000 Second Ave., Detroit 26, Michigan

Effective on bills rendered on and after June 1, 1959, under authority of Order D-1723-59.1 of the Michigan Public Service Commission, dated May 28, 1959.

M.P.S.C. No. 4

MICHIGAN PUBLIC SERVICE COMMISSION FILED MAY 21 1951

Sixth Revised Sheet No. D2
Cancels Fifth Revised Sheet No. D2
(Revising of Fuel Component from 1.25 Pounds of Coal to 15,500 Btu of Fuel)

GENERAL COMMERCIAL RATE
(SECONDARY NETWORK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

5.25¢ per kilowatthour for the first 100 kilowatthours,
4.25¢ per kilowatthour for the next 500 kilowatthours,
2.75¢ per kilowatthour for the next 6100 kilowatthours, and
1.70¢ plus the cost of 15,500 Btu of fuel per kilowatthour for the excess.

The fuel component of the energy charge per kilowatthour for service rendered during any month shall be the average cost to the Edison Company of 15,500 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Edison Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Costs of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 5% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 5% discount for prompt payment. See Special Minimum Charge, Sheet No. D6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 4/100 cents per kilowatthour.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: May 29, 1951
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after June 1, 1951, under authority of Order D-1723-59.2 of the Michigan Public Service Commission, dated May 8, 1951.

M.P.S.C. No. 4

Fifth Revised Sheet No. 238
Cancels Fourth Revised Sheet No. 238
(Including discount from 6% to 3% in energy charge per kwhr, and incorporating fuel clause)

COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire, or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

$1.50 per kilowatt of demand for the first 3 kilowatts,
$3.50 per kilowatt of demand for the next 197 kilowatts, and
$2.50 per kilowatt of demand for the excess,
Plus **1.8¢** per kilowatthour for the first 10,000 kilowatthours,
.7¢ plus cost of 1.25 cent per kilowatthour for the next 30,000 kilowatthours, and
.6¢ plus cost of 1.25¢ cent per kilowatthour for the excess.

The fuel component of the energy charge per kilowatthour for service rendered during any month shall be the average cost to the Edison Company for one and one quarter pounds of coal burned during the preceding month (or the equivalent in other fuels) figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Edison Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Costs of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.25 per month, less 3% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. 116.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT TERM: For Demands up to 100 Kilowatts: The agreements are upon order, terminable on three days written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatthour rate; the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charges

Issued: January 24, 1949
By J. W. Parker, President and General Manager
2900 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after January 24, 1949, under authority of Order D-1722 of the Michigan Public Service Commission, dated January 6, 1949.

M.P.S.C. No. 4

MICHIGAN PUBLIC SERVICE COMMISSION FILED MAY 21 1951

Sixth Revised Sheet No. 191
Cancels Fifth Revised Sheet No. 191
(Revision of Fuel Component from 25 Pounds of Coal to 13,500 Btu of Fuel)

COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire, or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

$1.50 per kilowatt of demand for the first 3 kilowatts,
$3.50 per kilowatt of demand for the next 197 kilowatts, and
$2.50 per kilowatt of demand for the excess,
Plus **1.8¢** per kilowatthour for the first 10,000 kilowatthours,
.7¢ plus the cost of 13,500 Btu of fuel per kilowatthour for the next 30,000 kilowatthours, and
.6¢ plus the cost of 13,500 Btu of fuel per kilowatthour for the excess.

The fuel component of the energy charge per kilowatthour for service rendered during any month shall be the average cost to the Edison Company of 13,500 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Edison Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Costs of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.25 per month, less 3% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. 116.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT TERM: For Demands up to 100 Kilowatts: The agreements are upon order, terminable on three days written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatthour rate; the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charges

Issued: May 29, 1950
By J. W. Parker, President and General Manager
2900 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after June 1, 1951, under authority of Order D-1722-51 of the Michigan Public Service Commission, dated May 8, 1951.

BEST COPY AVAILABLE

Exhibit "1"

M.P.S.C. No. 4

Fifth Revised Sheet No. D1
Cancels Fourth Revised Sheet No. D1
(Discount Reduced from 10% to 4%)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, poultry houses and other minor farm buildings.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor to those greenhouses, hatcheries, dairies or other enterprises which do a commercial business.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER RESIDENCE PER MONTH:

6¢ per kilowatthour for the first 15 kilowatthours,
4¢ per kilowatthour for the next 35 kilowatthours,
2½¢ per kilowatthour for the next 200 kilowatthours, and
2¢ per kilowatthour for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargable at 6¢, 4¢ and 2½¢ are twice the stated monthly quota.

DISCOUNT: 4% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 4% for prompt payment. For three phase service; $10.00 per month, less 4% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 1: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUL 22 1918

Issued: July 22, 1918
By J. W. Parker, President and General Manager,
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after July 7, 1918, under authority of Order D-1722 of the Michigan Public Service Commission, dated July 7, 1918.

Include with Page

Exhibit "1"

M.P.S.C. No. 4

Fourth Revised Sheet No. D3
Cancels Third Revised Sheet No. D3
(Discount Reduced from 10% to 4%)

GENERAL COMMERCIAL RATE
(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

5¢ per kilowatthour for the first 100 kilowatthours,
4¢ per kilowatthour for the next 300 kilowatthours,
2½¢ per kilowatthour for the next 6100 kilowatthours, and
2¢ per kilowatthour for the excess.

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUL 22 1918

DISCOUNT: 4% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 4% discount for prompt payment. See Special Minimum Charges, Sheet No. D6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT NO. 3: This is an open order agreement terminable on three days written notice by either party

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: July 22, 1918
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after July 7, 1918, under authority of Order D-1722 of the Michigan Public Service Commission, dated July 7, 1918

Exhibit "1"

M.P.S.C. No. 4

Sixth Revised Sheet No. D1
Cancels Fifth Revised Sheet No. D1
(Reducing Discount from 4% to 3%, increasing Kwhr charge for second, third and fourth steps of rate)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, poultry houses and other minor farm buildings.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor to those greenhouses, hatcheries, dairies or other enterprises which do a commercial business.

HOURS OF SERVICE: 24 hour

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER RESIDENCE PER MONTH:

6¢ per kilowatthour for the first 15 kilowatthours,
4.50¢ per kilowatthour for the next 35 kilowatthours,
2.75¢ per kilowatthour for the next 200 kilowatthours, and
2.25¢ per kilowatthour for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at 6¢, 4.50¢ and 2.75¢ are twice the stated monthly quota.

DISCOUNT: 3% for prompt payment

MINIMUM CHARGE: For single phase alternating current and for direct current service: 75¢ per month, less 3% for prompt payment. For three phase service; $10.00 per month, less 3% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: January 21, 1919
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after January 21, 1919, under authority of Order D-3222 of the Michigan Public Service Commission, dated January 6, 1919.

Exhibit "1"

M.P.S.C. No. 4

Fifth Revised Sheet No. D2
Cancels Fourth Revised Sheet No. D2
(Reducing Discount from 4% to 3%, increasing charges per kwhr, adding fuel clause)

GENERAL COMMERCIAL RATE
(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

5.25¢ per kilowatthour for the first 100 kilowatthours,
4.25¢ per kilowatthour for the next 300 kilowatthours,
2.75¢ per kilowatthour for the next 6100 kilowatthours, and
1.70¢ plus cost of 1.25¢ coal per kilowatthour for the excess.

The fuel component of the energy charge per kilowatthour for service rendered during any month shall be the average cost to the Edison Company for one and one quarter pounds of coal burned during the preceding month (or the equivalent in other fuels) figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Edison Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Costs of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 3% discount for prompt payment. See Special Minimum Charge, Sheet No. B6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: January 21, 1919
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after January 21, 1919, under authority of Order D-3222 of the Michigan Public Service Commission, dated January 6, 1919.

M.P.S.C. No. 4

Fourth Revised Sheet No. D1
Cancels Third Revised Sheet No. D1
(Discount Reduced from 10% to 4%)

COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

$4.50 per kilowatt of demand for the first 3 kilowatts,
$3.50 per kilowatt of demand for the next 197 kilowatts, and
$2.50 per kilowatt of demand for the excess,
Plus 1½¢ per kilowatthour for the first 10,000 kilowatthours,
1¢ per kilowatthour for the next 30,000 kilowatthours, and
9/10¢ per kilowatthour for the excess.

DISCOUNT: 4% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.25 per month, less 4% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT NO. 4: For Demands up to 100 Kilowatts: The agreements are open order, terminable on three days written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatthour rate; the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charges

MICHIGAN PUBLIC SERVICE COMMISSION FILED JUL 11 1943

Issued: July 22, 1943
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered on and after July 7, 1943, under authority of Order D-1222 of the Michigan Public Service Commission, dated July 7, 1943.

M.P.S.C. No. 4

Fourth Revised Sheet No. D1
Cancels Third Revised Sheet No. D1
(Cancels Reconnection Charge for Seasonal Dwellings)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, poultry houses and other minor farm buildings.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor to those greenhouses, hatcheries, dairies or other enterprises which do a commercial business.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER RESIDENCE PER MONTH:

6¢ per kilowatthour for the first 15 kilowatthours,
4¢ per kilowatthour for the next 35 kilowatthours,
2½¢ per kilowatthour for the next 200 kilowatthours, and
2¢ per kilowatthour for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at 6¢, 4¢ and 2½¢ are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 35¢ per month, less 10% for prompt payment. For three phase service; $10.00 per month, less 10% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 1: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

MICHIGAN PUBLIC SERVICE COMMISSION FILED JAN 8 1943

Issued: December 12, 1942
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit 26, Michigan

Effective on service rendered during and after first full billing period following December 1, 1942, under authority of Order D-1222 of the Michigan Public Service Commission, dated Nov. 26, 1942.

M.P.S.C. No. 4

Third Revised Sheet No. D1
Cancels Second Revised Sheet No. D1
(Reducing First Step from 4¢ to 4¢, and Adding Fourth Step of 2¢)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, poultry houses and other minor farm buildings.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor to those greenhouses, hatcheries, dairies or other enterprises which do a commercial business.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER RESIDENCE PER MONTH:

6¢ per kilowatthour for the first 15 kilowatthours,
4¢ per kilowatthour for the next 35 kilowatthours,
2½¢ per kilowatthour for the next 200 kilowatthours, and
3¢ per kilowatthour for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at *6¢, 4¢ and 2½¢* are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 10% for prompt payment. For three phase service; $1.00 per month, less 10% for prompt payment.

SUMMER COTTAGES, ETC.: For residences that are occupied only seasonally, that is during the summer months, fishing or hunting seasons or otherwise to like effect, a charge of $1.50 net, payable in advance, will be made each time a new account is opened, or a closed account is reopened, except that no such charge shall be made at the time of the initial connection of the building to the Company's lines.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

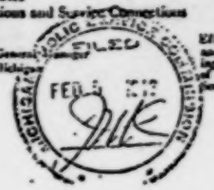
(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 1: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: January 21, 1936
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit, Michigan



Effective on service rendered during and after first full billing period following January 1, 1936, under authority and Order D-1222 of the Michigan Public Service Commission, dated January 21, 1936.

M.P.S.C. No. 4

Third Revised Sheet No. D2
Cancels *Second* Revised Sheet No. D2
(Reducing First Step to 10¢ Rate and Adding Fourth Step of 2¢)

GENERAL COMMERCIAL RATE
(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE PER MONTH:

5¢ per kilowatthour for the first 100 kilowatthours,
4¢ per kilowatthour for the next 500 kilowatthours,
2½¢ per kilowatthour for the next 6400 kilowatthours, and
2¢ per kilowatthour for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 10% discount for prompt payment. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT NO. 3: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Extensions

Issued: January 21, 1936
By J. W. Parker, President and General Manager
2000 Second Ave., Detroit, Michigan

Effective on service rendered on and after January 1, 1936, under authority of Order D-1222 of the Michigan Public Service Commission, dated January 21, 1936.

BEST COPY AVAILABLE

M.P.S.C. No. 4

Third Revised Sheet No. D1
Cancels *Second Revised* Sheet No. D1
(Reducing First Step of Demand Charge from $3.50 to $3.20 and Minimum Charge from $2.50 to $2.25)

COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

MICHIGAN PUBLIC SERVICE COMMISSION
FILED
FEB 5 1918

RATE PER MONTH:
$4.50 per kilowatt of demand for the first 3 kilowatts,
$3.50 per kilowatt of demand for the next 197 kilowatts, and
$2.50 per kilowatt of demand for the excess,
Plus 1½¢ per *kilowatthour* for the first 10,000 *kilowatthours*,
1¢ per *kilowatthour* for the next 30,000 *kilowatthours*, and
9/10¢ per *kilowatthour* for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.25 per month, less 10% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.

CONTRACT NO. 4: For Demands up to 100 Kilowatts: The agreements are open order, terminable on three days written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatthour rate; the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charge

Issued January 21, 1918
By J. W. Farrar, President and General Manager
2600 Second Ave., Detroit, Michigan

Effective on service rendered on and after January 1, 1918, pursuant to Order U-1222 of the Michigan Public Service Commission, dated January 21, 1918.

M.P.S.C. No. 4

Second Revised Sheet No. D3
Cancelling *First Revised* Sheet No. D3
(Energy charge should be reduced where customer elects to furnish his own lamp replacements)

GENERAL COMMERCIAL RATE
(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hours

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 8c per kwhr for the first 200 kwhr per month,
4c per kwhr for the next 500 kwhr per month, and
2½c per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 10% discount for prompt payment. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. *Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.*

CONTRACT NO. 3: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Extensions

Issued October 25, 1915
By A. C. Marshall, President
2600 Second Ave., Detroit, Michigan

FILED
NOV 10 1915

Effective November 1, 1915, as by Order of Under Docket of the Michigan Public Service Commission, dated October 6, 1915.

Exhibit "1"

M.P.S.C. No. 4

Second Revised Sheet No. D1
Cancelling *First Revised* Sheet No. D1
(Energy charge shall be reduced where customer elects to furnish his own lamp replacements)

COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: $5.00 per month per kilowatt of demand for the first 3 kilowatts,
$3.50 per month per kilowatt of demand for the next 197 kilowatts,
$2.50 per month per kilowatt of demand for the excess,
Plus 1½¢ per kwhr for the first 10,000 kwhr per month,
1¢ per kwhr for the next 30,000 kwhr per month, and
9/10¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.50 per month, less 10% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate. *Where the customer elects to furnish his own lamp replacements each step of the gross energy charge shall be reduced 6/100 cents per kilowatthour.*

CONTRACT NO. 4: For Demands up to 100 Kilowatts: The agreements are open order, terminable on three days' written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatthour rate; the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months' written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charges

Issued October 28, 1931
By Alfred C. Marshall, President
2000 Second Ave., Detroit, Michigan

MICHIGAN PUBLIC SERVICE COMMISSION
FILED
NOV 13 1931
DMH

Effective November 1, 1931, under authority of Order D-1722 of the Michigan Public Service Commission, dated October 6, 1931.

Exhibit "1"

M.P.S.C. No. 4

Second Revised Sheet No. D1
Cancels First Revised Sheet No. D1
(Reducing First Step from 9¢ to 8¢)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, henhouses and other minor farm buildings.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor to those greenhouses, hatcheries, dairies or other enterprises which are a commercial business.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: *8¢ per kwhr for the first 10 kwhr per residence per month,*
4¢ per kwhr for the next 40 kwhr per residence per month, and
2½¢ per kwhr for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at *8¢* and the number chargeable at *4¢* are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 10% for prompt payment. For three phase service; $10.00 per month, less 10% for prompt payment.

SUMMER COTTAGES, ETC.: For residences that are occupied only seasonally, that is during the summer months, fishing or hunting seasons or otherwise to like effect, a charge of $1.50 net, payable in advance, will be made each time a new account is opened, or a closed account is reopened, except that no such charge shall be made at the time of the initial connection of the building to the Company's lines.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:
(1) To residences connected for the first time to the lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 1: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued June 15, 1931
By A. C. Marshall, President
2000 Second Ave., Detroit, Michigan

MICHIGAN PUBLIC SERVICE COMMISSION
FILED
JUL 17 1931
RKH.

Effective July 1, 1931, under authority of Order D-1722 of the Michigan Public Service Commission dated June 13, 1931

Exhibit "1"

M.P.S.C. No. 4

First Revised Sheet No. D3
Cancelling Original Sheet No. D3
(Demand Charge and Energy Charge Rates for Large Consumptions).

COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons *desiring* service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

MICHIGAN PUBLIC SERVICE COMMISSION
FILED
MAR 7 - 1941
RAH

RATE: $1.00 per month per kilowatt of demand for the first 3 kilowatts,
$3.50 per month per kilowatt of demand for the next 197 kilowatts,
$2.50 per month per kilowatt of demand for the excess,
Plus 1½¢ per kwhr for the first 10,000 kwhr per month,
1¢ per kwhr for the next 20,000 kwhr per month, and
3/10¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.50 per month, less 10% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of *approved* burned out *incandescent* lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 4: For Demands up to 100 Kilowatts: The agreements are open order, terminable on three days' written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatt hour rate: the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months' written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charges

Issued February 17, 1941
By Alfred L. Marshall, President
2600 Second Ave., Detroit, Michigan

Effective March 1, 1941, under authority of Order No. D-1222 of the Michigan Public Service Commission, dated February 24, 1941

Exhibit "1"

M.P.S.C. No. 4

First Revised Sheet No. B3
Cancelling Original Sheet No. B3
(Reducing first step of rate from 2½¢ to 2½¢ per kwhr, and third step from 3¢ to 2½¢ per kwhr.)

GENERAL COMMERCIAL RATE
(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

MICHIGAN PUBLIC SERVICE COMMISSION
FILED
JUL 22 1940
RAH

RATE: 3¢ per kwhr for the first 300 kwhr per month,
4¢ per kwhr for the next 300 kwhr per month, and
2½¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 10% discount for prompt payment. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of burned out incandescent lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 3: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Extensions

Issued July 2, 1940
By A. C. Marshall, President
2600 Second Ave., Detroit, Michigan

Effective August 1, 1940, under authority of Order No. D-1222 of the Michigan Public Service Commission, dated July 1, 1940

M.P.S.C. No. 4

First Revised Sheet No. D1
Cancels Original Sheet No. D1
(Revision of Who May Take The Service)

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: *Persons desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence may be taken through the residence meter. Appurtenant buildings may include a garage for the use of the residents, and barns, henhouses and other minor farm buildings.*

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; *nor to those greenhouses, hatcheries, dairies or other enterprises which do a commercial business.*

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 9¢ per kwhr for the first 10 kwhr per residence per month,
4¢ per kwhr for the next 40 kwhr per residence per month, and
2½¢ per kwhr for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatt-hours chargeable at 9¢ and the number chargeable at 4¢ are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 10% for prompt payment. For three phase service; $10.00 per month, less 10% for prompt payment.

SUMMER COTTAGES, ETC.: For residences that are occupied only seasonally, that is during the summer months, fishing or hunting seasons or otherwise to like effect, a charge of $1.50 net, payable in advance, will be made each time a new account is opened, or a closed account is reopened, except that no such charge shall be made at the time of the initial connection of the building to the Company's lines.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:
(1) To residences connected for the first time to the lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 1: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: May 8, 1940
By A. C. Marshall, President
2900 Second Ave., Detroit, Michigan

MICHIGAN PUBLIC SERVICE COMMISSION FILED MAY 23 1940

Effective May 28, 1940, under authority of Order D-1722-38.1 of the Michigan Public Service Commission dated April 12, 1940

M.P.U.C. No. 1
Cancels M.P.U.C. No. 3

Original Sheet No. D1

MICHIGAN PUBLIC UTILITIES COMMISSION FILED JUN 24 1938

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences or farms including appurtenant buildings served from the residence meter.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor for commercial or industrial uses carried on in a residence or on a farm.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 9¢ per kwhr for the first 10 kwhr per residence per month,
4¢ per kwhr for the next 40 kwhr per residence per month, and
2½¢ per kwhr for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatt-hours chargeable at 9¢ and the number chargeable at 4¢ are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 10% for prompt payment. For three phase service; $10.00 per month, less 10% for prompt payment.

SUMMER COTTAGES, ETC.: For residences that are occupied only seasonally, that is during the summer months, fishing or hunting seasons or otherwise to like effect, a charge of $1.50 net, payable in advance, will be made each time a new account is opened, or a closed account is reopened, except that no such charge shall be made at the time of the initial connection of the building to the Company's lines.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge.
(1) To residences connected for the first time to the lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.
(2) As replacements of burned out Mazda lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 1: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 5—Line Extensions and Service Connections

Issued: April 1, 1938
By Alex Fleet, President
2900 Second Ave., Detroit, Michigan

Effective May 2, 1938, under authority of Order D-1722-38.1 of the Michigan Public Utilities Commission dated April 19, 1938

Include with page

M.P.U.C. No. 1
Cancels M.P.U.C. No. 3

Original Sheet No. B3

GENERAL COMMERCIAL RATE
(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 5¢ per kwhr for the first 250 kwhr per month,
4¢ per kwhr for the next 500 kwhr per month, and
3¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 10% discount for prompt payment. See Special Minimum Charges, Sheet No. B6.

LAMP SUPPLY: Replacements of burned out Mazda lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 3: This is an open order agreement, terminable on three days written notice by either party.

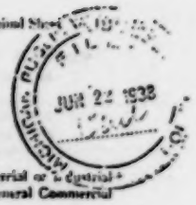
SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates.
Rule No. 5—Line Extensions and Service Extensions

Issued: April 1, 1938
By Alex Dow, President
One Second Ave., Detroit, Michigan

Effective May 2, 1938, under authority of Order U-1647-213 of the Michigan Public Utilities Commission, dated April 19, 1938

M.P.U.C. No. 1
Cancels M.P.U.C. No. 3

Original Sheet No. [illegible]



COMMERCIAL DEMAND RATE

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Commercial Rate.

HOURS OF SERVICE: 24 hour

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire services may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts three-wire.

RATE: $5.00 per month per kilowatt of demand for the first 3 kilowatts,
$3.50 per month per kilowatt for the excess demand,
Plus 1½¢ per kwhr for the first 10,000 kwhr per month, and
1¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.50 per month, less 10% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. B6

LAMP SUPPLY: Replacements of burned out Mazda lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate.

CONTRACT NO. 4: For Demands up to 100 Kilowatts: The agreements are open order, terminable on three days written notice by either party.
For Demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but *not* as to like-without rate; the term is *two years*, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, *which may be given at any time after the end of the first year.*

SEE ALSO THE FOLLOWING RULES:
Rule No. 1—Choice of Rates
Rule No. 2—Demand Determination
Rule No. 4—Resale of Service
Rule No. 5—Line Extensions and Service Connections
Rule No. 6—Special Minimum Charges

Issued: April 1, 1938
By Alex Dow, President
One Second Ave., Detroit, Michigan

Effective May 2, 1938, under authority of Order U-1647-213 of the Michigan Public Utilities Commission, dated April 19, 1938

Exhibit "1"

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences or farms, including appurtenant buildings served from the residence meter.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor for commercial or industrial uses carried on in a residence or on a farm.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 9¢ per kwhr for the first 10 kwhr per residence per month,
4¢ per kwhr for the next 40 kwhr per residence per month, and
2½¢ per kwhr for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatt hours chargeable at 9¢ and the number chargeable at 4¢ are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 10% for prompt payment. For three phase service; $1.00 per month, less 10% prompt payment.

SUMMER COTTAGES, ETC.: For residences that are occupied only seasonally, that is during the summer months, fishing or hunting seasons or otherwise to like effect, a charge of $1.50 net, payable in advance, will be made each time a new account is opened, or a closed account reopened, except that no such charge shall be made at the time of the initial connection of a building to the Company's lines.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge.

(1) To residences connected for the first time to the lines, in such quantities as may be needed, but not to exceed 30 lamps to any one residence.

(2) As replacements of burned out Mazda lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open Order, terminable on three days written notice by either party.

Sheet No. C1
First Revision

Effective: On bills rendered on and after March 10,

FOR EXTRA SHEET
SEE FILE NO. 2

Exhibit "1"

RESIDENCE RATE

WHO MAY TAKE THE SERVICE: Persons desiring service to residences or farms, including appurtenant buildings served from the residence meter.

This rate is not offered for industrial or commercial uses. Specifically it is not offered to rooming houses; nor to groups of cabins to be rented to tourists; nor to apartment buildings; nor to single apartments so small as to lack housekeeping facilities; nor for commercial or industrial uses carried on in a residence or on a farm.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire, or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 9¢ per kwhr for the first 10 kwhr per residence per month,
4¢ per kwhr for the next 40 kwhr per residence per month, and
2½¢ per kwhr for the excess.

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatt-hours chargeable at 9¢ and the number chargeable at 4¢ are twice the stated monthly quota.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: For single phase alternating current and for direct current service; 50¢ per month, less 10% for prompt payment. For three phase service; $1.00 per month, less 10% for prompt payment.

SUMMER COTTAGES, ETC: For residences that are occupied only seasonally, that is during the summer months, fishing or hunting seasons or otherwise to like effect, a charge of $1.50 net, payable in advance, will be made each time a new account is opened, or a closed account is reopened, [illegible] the Company's lines.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residences connected for the first time to the lines, in such quantities as may be needed, but not to exceed 30 lamps to any one residence.

(2) As replacements of burned out Mazda lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open Order, terminable on three days written notice by either party.

Sheet No. C1
Original

Effective: On bills rendered on and after November 1, 1936

FOR EXTRA SHEET
SEE FILE NO.

BEST COPY AVAILABLE

Exhibit "1"

M. P. U. C. No. 1 — THE DETROIT EDISON COMPANY
Lake Huron Division

First Revised Sheet No. 7
Canceling Original Sheet No. 7
(Allowing Free Lamp Supply and Adding Rural Residences and Summer Homes)

RESIDENCE SERVICE

CHARACTER OF SERVICE:

Who may take the Service: *Residence Customers in Urban and Rural Districts, and Summer Homes.*

Service to parts of residences or farms used for commercial or manufacturing purposes, to residential hotels, rooming houses, boarding houses, groups of cabins to be rented to tourists, and, in apartment buildings, to single rooms, groups of rooms, or suites not qualifying as residences will only be furnished under an appropriate Commercial Rate Schedule.

Hours of Service: *24 Hours.*

Kind of Service: *Alternating current, single phase, 60 cycles, 115-230 volts.*

RATE: 4½¢ per kilowatthour for the first 30 kilowatthours used per month,
3¢ net per kilowatthour for the next 70 kilowatthours used per month,
2½¢ net per kilowatthour for all excess over 100 kilowatthours used per month.

MINIMUM CHARGE: *For residence customers in urban areas, 75¢ per month; for residence customers in rural areas and for summer homes, $1.00 per month.*

BILLS: *All bills will be rendered at the net rate and will be due and payable within ten days following the date of the bill.*

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at 4½¢ and the number chargeable at 3¢ are twice the stated monthly quota.

LAMP SUPPLY:

Incandescent Lamps will be furnished without extra charge:

(1) *To premises connected for the first time to the lines, in such quantities as may be needed, but not to exceed 20 lamps in any one premises.*

(2) *As replacements of Mazda lamps burned out in service on the premises.*

TERM: *Open Order, terminable upon three days' notice by either party.*

For summer homes that are occupied only seasonally, that is, during the summer months, the fishing or hunting season, or otherwise in like effect, a charge of $1.50 is made at the start of a new season for re-establishing service discontinued by the customer's order at the end of the preceding season.

Issued: April 15th, 1926
Issued by Alex Dow, President
3000 Second Ave., Detroit, Michigan

Effective: May 1st, 1926
ISSUED UNDER AUTHORITY OF ELECTRIC APPROVAL DOCKET NO. D-1171 OF THE MICHIGAN PUBLIC UTILITIES COMMISSION, DATED APRIL 13th, 1926.

[illegible] SHEETS

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Exhibit "1"

GENERAL COMMERCIAL RATE

(BLOCK FORM)

WHO MAY TAKE THE SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Commercial Demand Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single-phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three-wire or 120-208 volt three phase four-wire service may be taken; or direct current service (of limited availability) is supplied at 120 volts, two-wire or 120-240 volts, three-wire.

RATE: 5¢ per kwhr for the first 250 kwhr per month,
1¢ per kwhr for the next 500 kwhr per month, and
3¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 10% discount for prompt payment. See Special Minimum Charges, Sheet No. 86.

LAMP SUPPLY: Replacements of burned out Mazda lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: Open order, terminable on three days written notice by either party.

Sheet No. 62
Original

Effective: On bills rendered on and after May 1, 1926

[illegible]

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Exhibit "1"

M. P. U. C. No. 2 — THE DETROIT EDISON COMPANY

Third Revised Sheet No. 9

Cancelling Second Revised Sheet No. 9

(Adding 300 watt size to list of lamps renewed without charge.)

GENERAL RULES

(6) LAMPS, PATROL SERVICE, ETC.

LAMPS. Original installations of incandescent lamps are bought and owned by customers, *EXCEPT* that to each residence when connected for the first time to the Company's lines, we furnish, free, 30, 50-watt or 60-watt Mazda lamps or such less number as may be necessary to equip the residence. The Company sells Mazda lamps, for use on its circuits, at list prices, to customers paying Lighting Rates, (except Open Air Amusement Park Rates), renewals of 25-watt, 30-watt, 40-watt, 50-watt, 60-watt, 100-watt and 250-watt Mazda lamps free, and renewals of some other sizes at reduced prices. Further information, and renewal prices in effect from time to time are given on the Company's Lamp Card, which is furnished to customers upon request.

Renewal prices are payable in addition to the return of the burned out lamps to the Company.

Renewals of lamps are furnished at the Company's offices; or, in the Detroit District, will be delivered, on request of the customer, to his premises.

PATROL SERVICE—In the Detroit District the Company's patrolmen are on duty twenty-four hours a day every day in the year, and will respond to emergency calls from customers. In the Eastern Michigan District similar patrol service is maintained during the day and early evening hours.

The patrolmen make such repairs on customers' premises as do not require the furnishing of any materials, other than replacements of burnt out plug fuses, up to 30 amperes, ferrule type fuses of 45 to 60 amperes, and knife blade fuses of 75, 100 and 125 ampere capacity. When the conditions require wiring, contractors' labor or materials, the patrolmen will disconnect the circuits causing the trouble, and notify customer that the trouble should be taken care of by an electrical wiring firm.

Under Power Service agreements by which patrol service is expressly excluded, the Company does not furnish this service; nor under the rate for Auxiliary Service. To Residence Service customers and customers served at Lighting Rates, (except Open Air Amusement Parks Rates), the Patrol service is free.

OUTDOOR ADVERTISING COMPANIES who buy current under the Company's Standard Lighting Contracts (Rate Sheets Nos. 21 and 22, M.P.U.C. No. 2) for lighting of outdoor advertising displays installed and leased by them, and who elect to furnish at their own expense the renewal of lamps and the patrol service which would otherwise be furnished by the Company under this Rule, will be given an additional discount of 5%, this discount to be figured on the gross bills before deducting the prompt payment discount.

Issued: August 17th, 1929 — Effective September 1st, 1929

Issued by Alex Dow, President
2000 Second Ave., Detroit, Michigan

Exhibit "1"

M. P. U. C. No. 2 — THE DETROIT EDISON COMPANY

Second Revised Sheet No. 9

Cancelling First Revised Sheet No. 9

(Changing allowance of free lamps for new residences from 25 to 30.)

GENERAL RULES

(6) LAMPS, PATROL SERVICE, ETC.

LAMPS. Original installations of incandescent lamps are bought and owned by customers, *EXCEPT* that to each residence when connected for the first time to the Company's lines, we furnish, free, 30, 50-watt or 60-watt Mazda lamps or such less number as may be necessary to equip the residence. The Company sells Mazda lamps, for use on its circuits, at list prices, to customers paying Lighting Rates, (except Open Air Amusement Parks Rates), renewals of 25-watt, 30-watt, 40-watt, 50-watt, 60-watt, 100-watt and 250-watt Mazda lamps free, and renewals of some other sizes at reduced prices. Further information, and renewal prices in effect from time to time are given on the Company's Lamp Card, which is furnished to customers upon request.

Renewal prices are payable in addition to the return of the burned out lamps to the Company.

Renewals of lamps are furnished at the Company's offices; or, in the Detroit District, will be delivered, on request of the customer, to his premises.

PATROL SERVICE—In the Detroit District the Company's patrolmen are on duty twenty-four hours a day every day in the year, and will respond to emergency calls from customers. In the Eastern Michigan District similar patrol service is maintained during the day and early evening hours.

The patrolmen make such repairs on customers' premises as do not require the furnishing of any materials, other than replacements of burnt out plug fuses, up to 30 amperes, ferrule type fuses of 45 to 60 amperes, and knife blade fuses of 75, 100 and 125 ampere capacity. When the conditions require wiring, contractors' labor or materials, the patrolmen will disconnect the circuits causing the trouble, and notify customer that the trouble should be taken care of by an electrical wiring firm.

Under Power Service agreements by which patrol service is expressly excluded, the Company does not furnish this service; nor under the rate for Auxiliary Service. To Residence Service customers and customers served at Lighting Rates, (except Open Air Amusement Parks Rates), the Patrol service is free.

OUTDOOR ADVERTISING COMPANIES who buy current under the Company's Standard Lighting Contracts (Rate Sheets Nos. 21 and 22, M.P.U.C. No. 2) for lighting of outdoor advertising displays installed and leased by them, and who elect to furnish at their own expense the renewal of lamps and the patrol service which would otherwise be furnished by the Company under this Rule, will be given an additional discount of 5%, this discount to be figured on the gross bills before deducting the prompt payment discount.

Issued: January 1st, 1930 — Effective February 1st, 1930

Issued by Alex Dow, President
2000 Second Ave., Detroit, Michigan

M. P. U. C. No. 9 THE DETROIT EDISON COMPANY

First Revised Sheet No. 9

Canceling Original Sheet No. 9

(Adding paragraph concerning Outdoor Advertising Companies, and adding 25-watt and 150-watt sizes to list of lamps renewed without charge)

GENERAL RULES

(6) LAMPS, PATROL SERVICE, ETC.

LAMPS. Original installations of incandescent lamps are bought and owned by customers, EXCEPT that in each residence when connected for the first time to the Company's lines, we furnish, free, 75, 50-watt or 60-watt Mazda lamps or such less number as may be necessary to equip the residence. The Company sells Mazda lamps, for use on its circuits, at list prices. It furnishes to customers paying Lighting Rates, (except Open Air Amusement Parks Rates), renewals of 60-watt, 50-watt, 40-watt, 100-watt, and 150-watt Mazda lamps free, and renewals of some other sizes at reduced prices. Further information, and renewal prices in effect from time to time are given on the Company's Lamp Card, which is furnished to customers upon request.

Renewal prices are payable in addition to the return of the burned out lamps to the Company.

Renewals of lamps are furnished at the Company's offices; or, in the Detroit District, will be delivered, on request of the customer, to his premises.

PATROL SERVICE.—In the Detroit District the Company's patrolmen are on duty twenty-four hours a day every day in the year, and will respond to emergency calls from customers. In the Eastern Michigan District similar patrol service is maintained during the day and early evening hours.

The patrolmen make such repairs on customers' premises as do not require the furnishing of any materials, other than replacements of burned out plug fuses, up to 30 amperes, ferrule type fuses of 35 to 60 amperes, and knife blade fuses of 70, 100 and 125 ampere capacity. When the conditions require wiring, contractors' labor or materials, the patrolmen will disconnect the circuits causing the trouble, and notify customer that the trouble should be taken care of by an electrical wiring firm.

Under Power Service agreements by which patrol service is expressly excluded, the Company does not furnish this service; nor under the rate for Auxiliary Service. To Residence Service customers and customers served at Lighting Rates, (except Open Air Amusement Parks Rates), the Patrol service is free.

OUTDOOR ADVERTISING COMPANIES who buy current under the Company's Standard Lighting Contracts (Rate Sheets Nos. 11 and 12, M.P.U.C. No. 9) for lighting of outdoor advertising displays installed and leased by them, and who elect to furnish at their own expense the renewal of lamps and the patrol service which would otherwise be furnished by the Company under this Rule, will be given an additional discount of 6%, this discount to be figured on the gross bills before deducting the prompt payment discount.

Issued: October 27th, 1926 Effective: On bills payable on and after December 1st, 1926

Issued by Alex Dow, President
2000 Second Ave., Detroit, Michigan

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M. P. U. C. No. 9 THE DETROIT EDISON COMPANY

Original Sheet No. 9

GENERAL RULES

(6) LAMPS, PATROL SERVICE, ETC.

LAMPS. Original installations of incandescent lamps are bought and owned by customers, EXCEPT that in each residence when connected for the first time to the Company's lines, we furnish, free, 75, 50-watt or 60-watt Mazda lamps or such less number as may be necessary to equip the residence. The Company sells Mazda lamps, for use on its circuits, at list prices. It furnishes to customers paying Lighting Rates, (except Open Air Amusement Parks Rates), renewals of 60-watt, 50-watt, 40-watt, 100-watt, and 150-watt Mazda lamps free, and renewals of some other sizes at reduced prices. Further information, and renewal prices in effect from time to time are given on the Company's Lamp Card, which is furnished to customers upon request.

Renewal prices are payable in addition to the return of the burned out lamps to the Company.

Renewals of lamps are furnished at the Company's offices; or, in the Detroit District, will be delivered, on request of the customer, to his premises.

PATROL SERVICE.—In the Detroit District the Company's patrolmen are on duty twenty-four hours a day every day in the year, and will respond to emergency calls from customers. In the Eastern Michigan District similar patrol service is maintained during the day and early evening hours.

The patrolmen make such repairs on customers' premises as do not require the furnishing of any materials, other than replacements of burned out plug fuses, up to 30 amperes, ferrule type fuses of 35 to 60 amperes, and knife blade fuses of 70, 100 and 125 ampere capacity. When the conditions require wiring, contractors' labor or materials, the patrolmen will disconnect the circuits causing the trouble, and notify customer that the trouble should be taken care of by an electrical wiring firm.

Under Power Service agreements by which patrol service is expressly excluded the Company does not furnish this service; nor under the rate for Auxiliary Service. To Residence Service customers and customers served at Lighting Rates, (except Open Air Amusement Parks Rates), the patrol service is free.

Issued: December 28th, 1933 Effective: January 1st, 1934

Issued by Alex Dow, President
2000 Second Ave., Detroit, Michigan

Page 77b

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Exhibit "1"

M. P. U. C. No. 1 THE DETROIT EDISON COMPANY

Original Sheet No. 8

RULES AND REGULATIONS

(6) LAMPS, PATROL SERVICE, ETC.

Original installations of incandescent lamps are bought and owned by customers, except that to each residence newly wired and connected for the first time to our lines we furnish, free, 25 10-watt Mazda lamps or such less number as may be necessary to equip the residence. We sell Mazda lamps, for use on our circuits, at list prices, to customers paying lighting rates. We furnish to those customers, renewals of 10-watt and 60-watt Mazda lamps free, and renewals of other sizes at reduced prices. Further information and renewal prices in effect from time to time are given on the Company's Lamp Card, which is furnished to customers upon request.

Renewal prices are payable in addition to the return of the burned out lamps to the Company.

Renewals may be made at the Company's offices, or, in the Detroit District, will be delivered, on request of the customer, to his premises.

All lamp ratings are given in watts, in accordance with modern engineering practice. Lamps are now labeled according to the energy required to operate them, instead of in candle power, as formerly.

In the Detroit District the Company's patrolmen are on duty twenty-four hours a day every day in the year, and will respond to emergency calls from customers. In the Eastern Michigan Districts similar patrol service is maintained during the day and early evening hours.

Our patrolmen make such repairs on customers' premises as do not require the furnishing of materials, except fuses. We furnish replacements of burned out plug fuses, up to 30 amperes, Ferrule type fuses of 15 to 60 amperes, and knife blade fuses of 75, 100 and 125 ampere capacity. In case of grounded circuits or repairs requiring wiring contractors' labor or materials, our men will disconnect the circuits causing the trouble and notify customer that the trouble should be taken care of by a construction firm.

Under power service agreements, by which agreements patrol service is excluded, we do not furnish this service. To other customers the service is free.

Issued: August 1st, 1933 Effective: August 15th, 1933

Issued by Alex Dow, President
2020 Second Ave., Detroit, Michigan

Exhibit "1"

Second Revised Sheet No. 6
Cancelling First Revised Sheet No. 6
Showing Lamp Renewal Price Schedule

RULES AND REGULATIONS

(6) LAMPS, PATROL SERVICE, ETC.

Original installations of incandescent lamps are bought and owned by customers, except that to each residence newly wired and connected for the first time to our lines we furnish, free, 25 10-watt Mazda lamps or such less number as may be necessary to equip the residence. We sell Mazda lamps, for use on our circuits, at list prices, to customers paying lighting rates. We furnish to those customers, renewals of 10-watt, 60-watt and 100-watt Mazda lamps free, and renewals of other sizes at reduced prices. Further information and renewal prices in effect from time to time are given on the Company's Lamp Card, which is furnished to customers upon request.

Renewal prices are payable in addition to the return of the burned out lamps to the Company.

Renewals may be made at the Company's offices, or will be delivered, on request of the customer, to his premises.

All lamp ratings are given in watts, in accordance with modern engineering practice. Lamps are now labeled according to the energy required to operate them, instead of in candle power, as formerly.

No lamps are furnished for auxiliary service for private plants.

The Company's patrolmen are on duty twenty-four hours a day every day in the year, and will respond to emergency calls from customers.

Our patrolmen make such repairs on customers' premises as do not require the furnishing of materials, except fuses. We furnish replacements of burned out plug fuses, up to 30 amperes, ferrule type fuses of 15 to 60 amperes, and knife blade fuses of 75, 100 and 125 ampere capacity. In case of grounded circuits or repairs requiring wiring contractors' labor or materials, our men will disconnect the circuits causing the trouble and notify customer that the trouble should be taken care of by a construction firm.

Under term power agreements, by which agreements patrol service is excluded, we do not furnish this service. To other customers the service is free."

Issued: March 1st, 1930 Effective: March 15th, 1930

Issued by Alex Dow, President
13 Washington Boulevard, Detroit, Michigan

Exhibit "1"

The Detroit Edison Company — Applying to City of Detroit

M. R. C. No. 1

First Revised Sheet No. 6
Cancelling Original Sheet No. 6
(Changing Lamp Renewal Schedule)

RULES AND REGULATIONS

(1) LAMPS, PATROL SERVICE, ETC.

Original installations of incandescent lamps are bought and owned by Customers, except that in each residence newly wired and connected for the first time to our lines we furnish, free, 25 10-watt Mazda lamps or such less number as may be necessary for the equipment. We sell Mazda lamps at list prices to Customers paying lighting rates, for use on our circuits. We furnish renewals to these Customers at the following prices per lamp:

TYPE S

10 Watt Detroit Edison Standard Mazdas	35c each
25 Watt Detroit Edison Standard Mazdas	35c each
40 Watt Detroit Edison Standard Mazdas	Free
60 Watt Detroit Edison Standard Mazdas	Free
100 Watt Detroit Edison Standard Mazdas	Free

TYPE C

250 Watt	50c each
400 Watt	50c each

These renewal prices are payable in addition to the return to us of the burned out Mazda lamp.

No lamps are furnished for auxiliary service for private plants.

The Company's patrolmen are on duty twenty-four hours a day every day in the year and will respond to emergency calls from customers.

Our patrolmen make such repairs on Customers' premises as do not require the furnishing of materials, except stock fuses. We furnish replacements of burnt and plug fuses, up to 30 amperes, ferrule type fuses of 35 to 60 amperes, and knife blade fuses of 70, 100 and 125 ampere capacity. In case of grounded circuits or repairs requiring wiring contractors' labor or materials, our men will disconnect the circuits causing the trouble and notify Customer that the trouble should be taken care of by a construction firm.

Under term power agreements, by which agreements patrol service is excluded, we do not furnish this service. To other Customers the service is free.

Issued: June 18th, 1913 — Effective: July 1st, 1913

Issued by Alex Dow, President
10 Washington Boulevard, Detroit, Michigan

Exhibit "1"

The Detroit Edison Company — Applying to City of Detroit

M. R. C. No. 1

Original Sheet No. 6

RULES AND REGULATIONS

(1) LAMPS, PATROL SERVICE, ETC.

Original installations of incandescent lamps are bought and owned by Customers, except that in each residence newly wired and connected for the first time to our lines we furnish, free, 20 10-watt Mazda lamps or such less number as may be necessary for the equipment. We sell Mazda lamps at list prices to Customers paying lighting rates, for use on our circuits. We furnish renewals to these Customers at the following prices per lamp:

10 Watt Detroit Edison Standard Mazdas	Free
25 Watt Detroit Edison Standard Mazdas	Free
100 Watt Detroit Edison Standard Mazdas	Free
25 Watt Detroit Edison Standard Mazdas	35c each
150 Watt Detroit Edison Standard Mazdas	50c each
250 Watt Detroit Edison Standard Mazdas	50c each

These renewal prices are payable in addition to the return to us of the burned out Mazda lamp.

No lamps are furnished for auxiliary service for private plants.

The Company's patrolmen are on duty twenty-four hours a day every day in the year and will respond to emergency calls from customers.

Our patrolmen make such repairs on Customers' premises as do not require the furnishing of materials, except stock fuses. We furnish replacements of burnt and plug fuses, up to 30 amperes, ferrule type fuses of 35 to 60 amperes, and knife blade fuses of 70, 100 and 125 ampere capacity. In case of grounded circuits or repairs requiring wiring contractors' labor or materials, our men will disconnect the circuits causing the trouble and notify you that the trouble should be taken care of by a construction firm.

Under term power agreements, by which agreements patrol service is excluded, we do not furnish this service. To other Customers the service is free.

Issued: April 1st, 1913 — Effective: May 1st, 1913

Exhibit #2 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being an advertisement by Edison of the lamp program. This document was also described as Deposition Exhibit #7.

Jim Lansing

LAMP INSTALLATION AND RENEWAL POLICY

Installations

Original installations of incandescent lamps are bought and owned by customers except that to each residence newly wired and connected for the first time to our lines, we furnish, free, thirty Mazda lamps or such less number as may be necessary for its equipment. The lamp sizes shall be selected to fit the needs of the residence in accordance with modern good lighting practice.

Renewals

Customers being served by The Detroit Edison Company with current for lighting purposes and at lighting rates (except Open Air Amusement Park rates) are entitled to renewals without charge of 25, 40, 60, 100, 150, 200 and 300 watt lamps upon presentation at one of the Company's offices or authorized lamp renewal agencies of an unbroken, burned-out standard make Mazda lamp.

FORM 8ª 217

83 J. Lansing

STANDARD MAZDA LAMP PRICE LIST

THE DETROIT EDISON COMPANY

1932

File

Lamp Size	Standard Package Quantities	Sale Price Clear	Sale Price Inside Frost	Renewal Charge*
15 watt	120		$ .20	$ .20
25 watt	120		.20	Free
40 watt	120		.20	Free
60 watt	120		.20	Free
100 watt	60		.35	Free
150 watt	24	$ .60	.65	Free
200 watt	24	.80	.85	Free
300 watt	24	1.25	1.35	Free
500 watt	12	2.00	2.15	$2.15

* Note Renewal Policy on back page

DISCOUNTS

In lots of six or more lamps (including assorted sizes) 10%
Standard package lots 15%

COST OF CURRENT USED BY MAZDA LAMPS AT 5c PER KWH

The residence rate averages less than 5c per KWH.

	15w	25w	40w	60w	100w
COST OF CURRENT USED FOR 1 HOUR	1/13¢	1/8¢	1/5¢	1/3¢	1/2¢
NUMBER OF HOURS LAMP WILL BURN FOR 1 CENT	13¼	8	5	3¼	2

Exhibit #3 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a letter from G. L. Lahodny, Edison Vice President to new customers. This document was Plaintiff's Deposition Exhibit #6.

(Letterhead of Detroit Edison Company)

We are pleased . . .

. . . to have added your name to the growing list of people we serve. It is our understanding that this is the first time you have had an account with us.

Enclosed is some information about Edison services. You will note that we exchange burned-out incandescent light bulbs and some appliance cords on a no charge basis. We also repair electric water heaters, ranges, dryers, incinerators and most small appliances. There is no charge for electric operating parts on the large appliances listed and new parts for small appliances are furnished at list price. In either case, there is no charge for labor.

Would you look over the enclosed bill to be sure that your name and mailing address are correct as shown? Also, if you have had an account with us previously, would you let us know the approximate date the account was closed and the last address at which we served you, so that we can update our records? A note in the margin or on the back of this letter, returned in the enclosed envelope will suffice.

Detroit Edison considers it a privilege to serve you. Please stop in at one of our offices, or call us, any time we can be of help or can tell you more about living better . . . electrically.

Cordially,

(s) G. L. Lahodny
G. L. Lahodny
Executive Vice-President
for Marketing

encls.

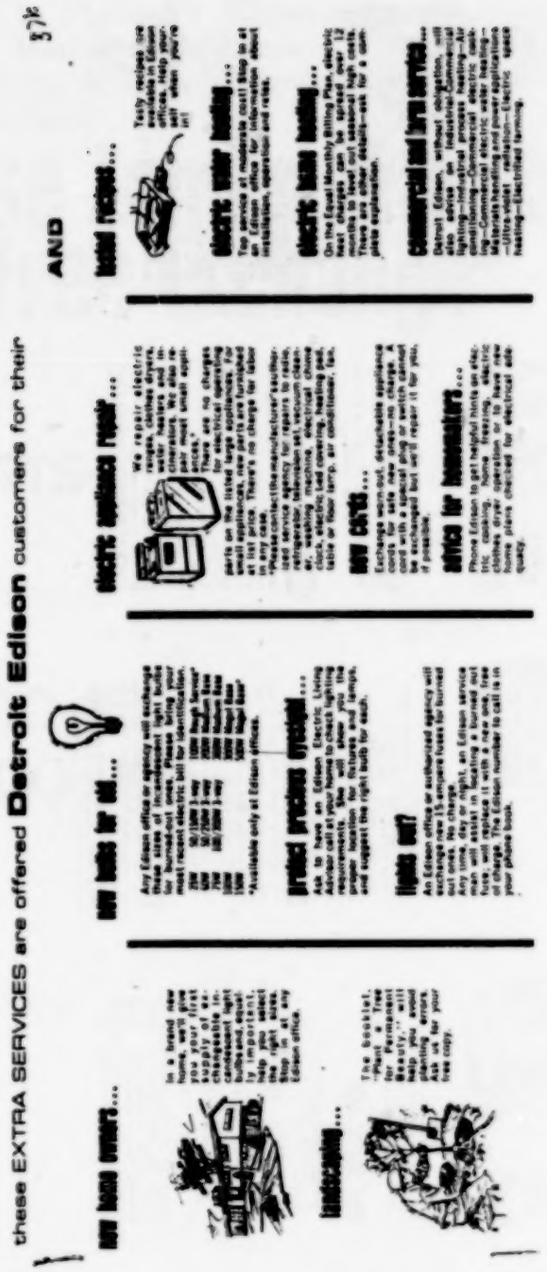


Exhibit "3"

INFORMATION OF LASTING VALUE ABOUT EDISON...

office hours...

You can take care of any business with Edison at any of our convenient offices. To locate the nearest one, check the phone book.
HOURS: 8:30-5:00, Monday thru Friday, except holidays.

phone us in any of these situations

When lights go out. Give us the address and nearest cross street.
If an overhead wire breaks. Be sure to stay away from it. Help other people stay away from it. To pick up or move a hanging or fallen wire.
If you need any service when our offices are not open.
When you move out. Please give at least 3 days' notice in closing your present account.
When you move in to a home previously occupied by someone else.
When you want electric service in a brand new home. Please give 3-4 weeks' notice in this case.

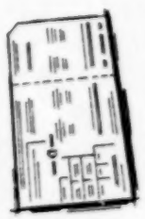
rates...

DOMESTIC SERVICE RATE
For two months service.
First 30 kilowatt hours (kwhrs)—$3.00
Next 170 kwhrs @ 3.5¢ each
Next 200 kwhrs @ 2.5¢ each
Next 600 kwhrs @ 1.9¢ each
1.7¢ per kwhr for the excess.
Minimum two-month bill—$3.00
Subject to 4% Michigan Sales Tax.
Plus ½% Detroit Utility Users Tax where applicable. Less 3% discount for prompt payment.

ALL-ELECTRIC DOMESTIC RATE
with complete electric heat and electric water heating. Available on new copy this rate. Details at any Edison office.
For two months service.
First 30 kwhrs—$3.00
Next 170 kwhrs @ 3.5¢ each
Next 200 kwhrs @ 2.5¢ each
Next 600 kwhrs @ 2.1¢ each
Next 600 kwhrs @ 1.9¢ each
1.5¢ per kwhr for the excess.
Minimum two-month bill—$3.00
Subject to 4% Michigan Sales Tax.
Plus ½% Detroit Utility Users Tax where applicable. Less 3% discount for prompt payment.
(Note: Electric water heating not included above. Rates given apply when water heating is separately metered and billed.)

your credit...

Our customers use electricity and pay for it every month—others who have not formed a cash deposit may be asked for one if payment of a bill becomes overdue.



your electric bills

Residential bills are mailed every two months, and cover two months' service. The first bill to a new address may be for somewhat more or less than two months' service. Bills may be paid by mail or at any Edison office or authorized agency.

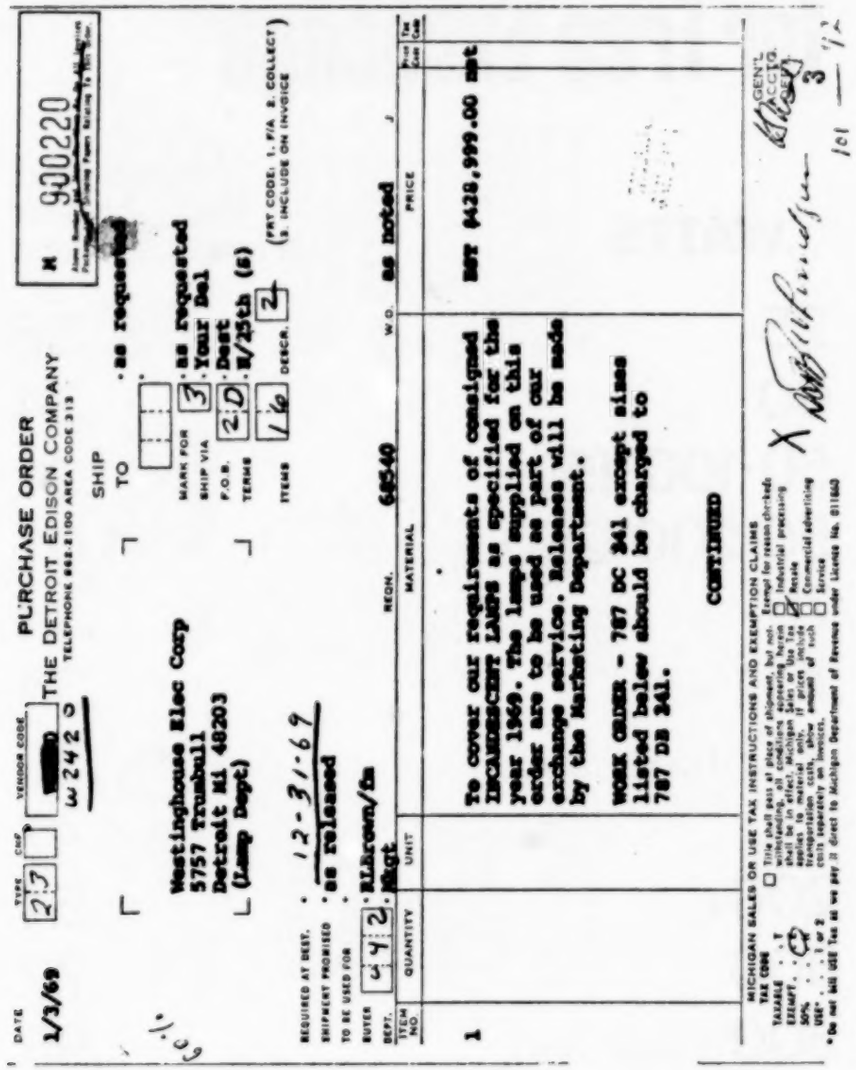
Exhibit "4"

Exhibit #4 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a display placard placed in distribution centers by Edison.

These Lamps Available for Free Exchange

WATTS	Additional Lamps May Be Purchased at Prices Listed Below
25	$ .36
60	.34
50·100·150	.91
50·200·250	1.01
75	.34
100	.34
100 (rough service)	.52
150	.47
200	.54
300	.77
300 (large base)	.98
500	1.40

Exhibit #5 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being samples of light bulb purchase orders issued by Edison to bulb suppliers. These documents were Plaintiff's Deposition Exhibit #5.



PURCHASE ORDER
THE DETROIT EDISON COMPANY
TELEPHONE 962-2100 AREA CODE 313

N 900220

DATE 1/3/69 — TYPE 2:3 — CSP — VENDOR CODE W2423

SHIP TO · as requested

Westinghouse Elec Corp
5757 Trumbull
Detroit MI 48203
(Lamp Dept)

MARK FOR · 3 · as requested
SHIP VIA · Your Del
F.O.B. · 2:D · Dest
TERMS · 1:6 · 2% 15th
ITEMS 2 DESCR. (PAY CODE: 1. P/A 2. COLLECT 3. INCLUDE ON INVOICE)

REQUIRED AT DEST. · 12-31-69
SHIPMENT PROMISED · as released
TO BE USED FOR ·
BUYER · 64 2 · RLBrown/dm
DEPT. · Mgt

REQN. 66540 W.O. as noted

ITEM NO	QUANTITY	UNIT	MATERIAL	PRICE
1			To cover our requirements of INCANDESCENT LAMPS as specified for the year 1969. The lamps supplied on this order are to be used as part of our exchange service. Releases will be made by the Marketing Department. WORK ORDER - 787 DC 341 except sizes listed below should be charged to 787 DB 341. CONTINUED	EST $426,999.00 nte

MICHIGAN SALES OR USE TAX INSTRUCTIONS AND EXEMPTION CLAIMS
TAX CODE
TAXABLE . . 1
EXEMPT . . 2
50% . . . 3
USE* . . . 4 or 5
☐ Title shall pass at place of shipment, but sub. to withholding, all conditions appearing hereon shall be in effect, Michigan Sales or Use Tax applies to material only. If price includes taxes, state amount of such taxes separately on invoices.
Exempt for reason checked:
☐ Industrial processing
☐ Resale
☐ Commercial advertising
☐ Service
* Do not bill USE Tax as we pay it direct to Michigan Department of Revenue under License No. 011560

GEN'L ACCTG.

PURCHASE ORDER
THE DETROIT EDISON COMPANY
TELEPHONE 962-2100 AREA CODE 313

N 010621

SHIP TO · As requested

Sylvania Electric Products
10300 Ford Road
Dearborn, Michigan

MARK FOR · As requested
SHIP VIA 3 · Your delivery
F.O.B. 2:F · Destination
TERMS · 2% 15th
ITEMS 14 DESCR. 2 (PAY CODE: 1. P/A 2. COLLECT 3. INCLUDE ON INVOICE)

12-31-70

· As requested
· As released
· R.L. Brown/am Marketing

REQN. 51196 W.O. See note below

QUANTITY	UNIT	MATERIAL	PRICE
		To cover our requirements of INCANDESCENT LAMPS as specified for the year 1970. The lamps supplied on this order are to be used as part of our exchange service. Releases will be made by the Marketing Dept. WORK ORDER:: 787 DC 341 except sizes listed below should be charged to 787 DB341. 100PS 300H/IF (medium) 300IF (mogul) 500IF CONTINUED	Est. $104,609.00 nte

MICHIGAN SALES OR USE TAX INSTRUCTIONS AND EXEMPTION CLAIMS
☐ Title shall pass at place of shipment, but sub. to withholding, all conditions appearing hereon shall be in effect. Michigan Sales or Use Tax applies to material only. If price includes taxes, state amount of such taxes separately on invoices.
Exempt for reason checked:
☐ Industrial processing
☐ Resale
☐ Commercial advertising
☐ Service
* Do not bill USE Tax as we pay it direct to Michigan Department of Revenue under License No. 011560

GEN'L ACCTG.

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Exhibit "5"

Sylvania Electric Products M-010221

1	1	25A/3	802-0025	$ .28 ea. 57%
2	1	50A/3	802-0050	$ .27 ea.
3	1	75A/3	802-0075	$ .27 ea.
4	1	50/250A/3W	802-0097	$ .79 ea.
5	1	100/A3	802-0100	$ .27 ea.
6	1	50/150/3	802-0105	$ .61 ea.
7	1	150A/3	802-0150	$ .38 ea.
8	1	200A/3	802-0200	$ .40 ea.
9	223,190	100-300-3	802-0250	$1.09 ea.
10	1	300/IF/3 (mogul)	802-0300	$ .75 ea.
11	1	500/IF/3	802-0305	$1.15 ea.
12	1	300A/I/IF/3	802-0310	$ .60 ea.
13	1	100A21/RS/3	802-0012	$ .54 ea.
	1	.75 H/K S	All each Less 57%	.010 FIRM PRICE

94

Exhibit "5"

PURCHASE ORDER
THE DETROIT EDISON COMPANY
TELEPHONE 868-2100 AREA CODE 313

M 900219

DATE 1-3-69 TYPE 23 TERMS CODE G 1080

SHIP TO
General Electric Co
Lamp Division
15135 Wyoming
Detroit MI 48303

MARK FOR 3
SHIP VIA Your del
F.O.B. Dest
TERMS 20 2/10th (E)
ITEMS 1 DESCR. 2 (FRT CODE: L, F/A, P, COLLECT; S, INCLUDE ON INVOICE)

REQUIRED AT REST. : As requested
SHIPMENT PROMISED : As requested
TO BE USED FOR : Re-released
BUYER 042 : Rikrone/jm
DEPT. : Marketing

W.O. As noted

ITEM NO.	QUANTITY	UNIT	REQN. 68541 MATERIAL	PRICE
			To cover our requirements of condenser LAMPS as specified for the year 1969. The lamps supplied on this order are to be used as part of our exchange service. Releases will be made by the Marketing Division.	Est $1,127,600.00
			WORK ORDERS, 787 DC 341 except sizes listed below should be charged to 787 DB 341.	FAB PLATES:

—CONTINUED—

MICHIGAN SALES OR USE TAX INSTRUCTIONS AND EXEMPTION CLAIMS
TAX CODE ☐ This shall pass all State of Michigan Sales or Use Taxes. TAXABLE ☐ EXEMPT ☐ Sale to material which is exempt from Michigan Sales or Use Taxes. Transportation costs, when shown separately on invoice, are not subject to Michigan Sales or Use Taxes. USE ☐ 1 of 2
• Do not bill USE Tax as we pay it direct to Michigan Department of Revenue

GENL ACCTG KEEP 3

95

VENDOR: General Electric Co | P.O. N-900219 | PAGE 2

100 RS, 300M/IF (medium), 300IF (mogul), 500IF, 750T24BP, 1MT24BP

OLD NUMBER 787DC341

ITEM	QUANTITY	UNIT	MATERIAL			PRICE	Tax Code
1	772396		25A/S	802-0025	120V	$ .107	E
2	1		50A/S	802-0050	120V	$ .107	
3	1		75A19/S	802-0075	120V	$ .107	
7	1		50/250M/M	802-0097	120V	$ .296	
4	1		100A/S	802-0100	120V	$ .107	
6	1		50/150A	802-0105	120V	$ .254	
5	1		150A/S	802-0150	120V	$ .142	
8	1		200A/S	802-0200	120V	$ .164	
9	1		100/300	802-0250	120V	$ .426	
13	1		300/IF	802-0300	120V	$ .323	
14	1		500/IF	802-0305	120V	$ .494	
12	1		300M/S/IF	802-0310	120V	$ .254	

all item 6%

TABULATED

787DC341 787DB341 787DC341 787DC341 787DC341 787DC341 787DC341 787DC341 787DB341 787DB341 787DB341

DE FORM PD 250 9-66

-CONTINUED-

96 1

280a
Exhibit "5"

VENDOR: General Electric Co | P.O. N-900219 | PAGE 3

ITEM	QUANTITY	UNIT	MATERIAL			PRICE	Tax Code
15	1		750T24	802-0375	120V	$3.22	E
16	772396		1M/T24	802-0380	120V	$3.65	
11	1		100A/BP	802-0012	120V	$ .194	
10	1		75/A/RS	787DB341		.00	

All item 6%

All each LESS 6%

FIRM PRICE

787DB341 787DB341 787DB341

DE FORM PD 250 9-66

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281a
Exhibit "5"

DATE 1-3-69 | TYPE 23 | CHG | VENDOR CODE 58320

PUP ASE ORDER
THE DETROIT EDISON COMPANY
TELEPHONE 962-2100 AREA CODE 313

M 900221
Above Number Must Appear On All Invoices, Packages, and Shipping Papers Relating To This Order.

SHIP TO • As requested

Sylvania Electric Products
10800 Ford Road
Dearborn Mi

MARK FOR
SHIP VIA 3 • As requested
F.O.B. • Your del
TERMS 2F • Dest
ITEMS 14 DESCR. 2 • 2% 15th

(FRT CODE: 1. F/A 2. COLLECT 3. INCLUDE ON INVOICE)

REQUIRED AT DEST. 12-31-69
SHIPMENT PROMISED • As requested
TO BE USED FOR • As released
BUYER 042 • RLBrown/jn
DEPT. • Marketing

REQN. 68539 W.O. As noted

ITEM NO.	QUANTITY	UNIT	MATERIAL	PRICE	Price Code	Tax Code
			To cover our requirements of INCAN-DESCENT LAMPS as specified for the year 1969. The lamps supplied on this order are to be used as part of our exchange service. Releases will be made by the Marketing Dept. WORK ORDER: 787 DC 341 except sizes listed below should be charged to 787 DB 341. 100 RS 300W/IF (medium)	Est $184,524.00 .516 TABULATED JAN 10 [illegible] -CONTINUED-		

MICHIGAN SALES OR USE TAX INSTRUCTIONS AND EXEMPTION CLAIM

TAX CODE
TAXABLE . . T
EXEMPT . . 0
50% . . . 1 or 2
USE* . . . 1 or 2

☐ Title shall pass at place of shipment, but notwithstanding, all conditions appearing herein shall be in effect. Michigan Sales or Use Tax applies to material only. If prices include transportation costs, show amount of such costs separately on invoices.

Exempt for reason checked:
☐ Industrial processing
☑ Resale
☐ Commercial advertising
☐ Service

* Do not bill USE Tax as we pay it direct to Michigan Department of Revenue under License No. 011860

X [signature]

GEN'L ACCTG. DEPT. 3

282a
Exhibit "5"

VENDOR Sylvania Electric Products | P.O. M-900221 | PAGE 2

ITEM	QUANTITY	UNIT	MATERIAL	PRICE	Tax Code
			300 IF 500 IF OLD NUMBER 8-3209	all new 57%	
1	1		25A/3 7870-741 802-0025	$ .25 ea	E
2	1		50A/3 802-0050	$ .25 ea	
3	1		75A/3 802-0075	$ .25 ea	
07	1		50/250W/3W 802-0097	$ .72 ea	
04	1		100/A3 802-0100	$ .25 ea	
6	1		50/150/3 802-0105	$ .59 ea	
05	1		150A/3 802-0150	$ .35 ea	
07	1		200A/5 802-0200	$ .37 ea	
08	1		100/300/3 802-0250	$ .99 ea	
13	1		300/IF (medium) 7870-1341 802-0300	$ .75 ea	
14	357,605		500/IF 802-0305	$1.20 ea	

-CONTINUED-

DE FORM PD 200 9-68

44

283a
Exhibit "5"

VENDOR **Sylvania Electric Products** P.O. **M-900221** PAGE **3**

ITEM	QUANTITY	UNIT	MATERIAL	PRICE
			787DB341	all less 57%
12	1		300M/I/IF 802-0310	$ .55 ea
11	1		100A21/RS 802-0012	$ .43 ea
10	1		754/RS	0.43 All each LESS 57%
				FIRM PRICE

INSULATED

DE FORM PO-DHO 9-66

100

284a
Exhibit "5"

DATE **1/3/69** TYPE **27** CNF [ ] VENDOR CODE [redacted] **W2420**

PURCHASE ORDER
THE DETROIT EDISON COMPANY
TELEPHONE 868-8100 AREA CODE 313

M **900220**

SHIP TO • as requested

Westinghouse Elec Corp
5757 Trumbull
Detroit Mi 48203
(Lamp Dept)

MARK FOR • as requested
SHIP VIA 3 • Your Del
F.O.B. 2D • Dest
TERMS • N/25th (S)
ITEMS 1 to 6 DESCR. 2 (FRT CODE: 1. F/A 2. COLLECT $ INCLUDE ON INVOICE)

REQUIRED AT DEST. • 12-31-69
SHIPMENT PROMISED • as released
TO BE USED FOR •
BUYER 442 • RLBrown/fm
DEPT. • Mkgt

REQN. 68540 W.O. as noted

ITEM NO.	QUANTITY	UNIT	MATERIAL	PRICE
1			To cover our requirements of consigned INCANDESCENT LAMPS as specified for the year 1969. The lamps supplied on this order are to be used as part of our exchange service. Releases will be made by the Marketing Department. WORK ORDER - 787 DC 341 except sizes listed below should be charged to 787 DB 341. CONTINUED	EST $428,999.00 net

MICHIGAN SALES OR USE TAX INSTRUCTIONS AND EXEMPTION CLAIMS

TAX CODE
TAXABLE . . 1
EXEMPT . . 2
50% . . . 3
USE* . . . 1 or 2

☐ Title shall pass at place of shipment, but not withstanding, all conditions appearing herein shall be in effect. Michigan Sales or Use Tax applies to material only. If prices include transportation costs, show amount of such costs separately on invoice.

Exempt for reason checked:
☐ Industrial processing
☑ Resale
☐ Commercial advertising
☐ Service

* Do not bill USE Tax as we pay it direct to Michigan Department of Revenue under License No. 011063

X [signature] GENL ACCTG

3

101 — 12

285a
Exhibit "5"

VENDOR Westinghouse Elec Corp P.O. M-900220 PAGE 2

ITEM	QUANTITY	UNIT	MATERIAL		PRICE	Price Code	Tax Code
			100 RS 300M/IF (medium) 300 IF (megul) 500 IF 750 T 24 RP 1MF24RP	OLD NUMBER 8002OP	all less 60%		
1	429003		25A/6	802-0025 7A70C341	$ .25 each		E
2	1		50/A6	802-0050	.25 each		
3	1		75/A6	802-0075	.25 each		
7	1		50/250M/6	802-0097	.72 each		
4	1		100A/M6	802-0100	.25 each		
6	1		50/150M/6	802-0105	.59 each		
5	1		150A/M6	802-0150	.35 each		

CONTINUED

TABULATED 1 TO 1000

DE FORM PD 200 9-66

102

286a
Exhibit "5"

VENDOR Westinghouse Elec Corp P.O. M-900220 PAGE 3

ITEM	QUANTITY	UNIT	MATERIAL		PRICE	Price Code	Tax Code
					all less 60%		
9	1		200A/M6	802-0200 7870C341	$ .37 each		E
8	1		100/300P825	802-0250 7870C341	.99 each		
13	1		300/IF	802-0300 7870B341	.75 each		
14	1		500/IF	802-0305	1.20 each		
12	1		300M/1/IF	802-0310	.55 each		
15	1		750T24	802-0375	8.00 each		
16	1		1MF24	802-0380	8.50 each		
11	1		100A21/RS	802-0012	.43 each		
10	1		75A/RS		ALL LESS 60% FIRM PRICE		

TABULATED 1 TO 1000

DE FORM PD 200 9-66

103

287a
Exhibit "5"

PURCHASE ORDER CHANGE

THE DETROIT EDISON COMPANY
2000 SECOND AVENUE
DETROIT, MICHIGAN 48226

Westinghouse Elec Corp
5757 Trumbull
Detroit Mi 48203
(Lamp Dept)

PURCHASE ORDER NO. M 900220
DATED 1/3/69
CHANGE ORDER NO. 3
DATE 2/24/69

BUYER · RLBrown/cm
DEPARTMENT · Mkgt
LOCATION · All Offices REGN 68540 W.O. As Noted ~~Blank~~

PLEASE CHANGE Cash Terms (ITEM NO. (AND EDISON NO., IF ANY)) ON THE ABOVE PURCHASE ORDER AS SHOWN:

☐ QUANTITY ☐ PRICE ☐ CANCEL ☐ CONSIDER COMPLETE ☐ _____

FROM 2%/25th (S) TO 2% 10th Prox

DE FORM PO-55 10-67

R. C. BOUSE, DIRECTOR OF PURCHASES

THIS CHANGE ORDER HEREBY BECOMES A PART OF THE ORIGINAL PURCHASE ORDER AND IS SUBJECT TO ALL OF THE CONDITIONS SPECIFIED THEREON.

BY _____

GENERAL ACCOUNTING DEPT.
3 104

PURCHASE ORDER CHANGE

THE DETROIT EDISON COMPANY
2000 SECOND AVENUE
DETROIT, MICHIGAN 48226

Westinghouse Elec Corp
5757 Trumbull
Detroit Mi 48203
(Lamp Dept)

PURCHASE ORDER NO. M 900220
DATED 1/3/69
CHANGE ORDER NO. 2
DATE 2/4/69

BUYER · RLBrown/cm
DEPARTMENT · Mkgt
LOCATION · All offices REGN 68540 W.O. _____

PLEASE CHANGE Cash terms (ITEM NO. (AND EDISON NO., IF ANY)) ON THE ABOVE PURCHASE ORDER AS SHOWN:

☐ QUANTITY ☐ PRICE ☐ CANCEL ☐ CONSIDER COMPLETE ☐ _____

FROM M/25th (S) TO 2%/25th (S)

DE FORM PO-55 10-67

R. C. BOUSE, DIRECTOR OF PURCHASES

THIS CHANGE ORDER HEREBY BECOMES A PART OF THE ORIGINAL PURCHASE ORDER AND IS SUBJECT TO ALL OF THE CONDITIONS SPECIFIED THEREON.

BY _____

GENERAL ACCOUNTING DEPT.
3 105

Exhibit #7 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a "Resume of the 1955 Customer Survey by Central Surveys Inc." This document was Plaintiff's Deposition Exhibit #9.

THE DETROIT EDISON COMPANY

Economic Analysis

MIDDLE WEST SERVICE COMPANY
Twenty North Wacker Drive
CHICAGO

This total is broken down as follows:

Labor Expense	$4,896,000
Material and Supplies	2,897,000

Because of the excellent public reception of this policy, it is understandable that The Detroit Edison Company would consider any changes only after careful study.

However, the Company is faced with the necessity of improving its earnings. It may well be that a general rate increase is inevitable. If Detroit Edison could eliminate part of this free servicing, or charge for a part of it, the amount of necessary rate increase would be reduced correspondingly.

Consequently, it was decided to conduct a public opinion survey on the question. Central Surveys, Inc. of Shenandoah, Iowa, was employed for the purpose. The survey was made in January, 1955. Some of the results of the survey are of interest here.

69% of the people had favorable opinions of the electric rates. Only 27% were critical.

84% of the people are aware of the fact that The Detroit Edison Company provides free repair service. 70% of the people recall having used the free repair service.

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95% of the people have made use of the free light bulb exchange service. 58% of the people sometimes buy light bulbs.

Finally this question was asked: — "If the electric company had to make a choice between cutting out the free services, or raising the rates by about 75¢ a month — (that would be about $1.50 on the bill you receive every two months) — which would you rather they would do?"

(The 75¢ a month per customer on an annual basis would approximately equal the total cost of the free service).

The answers to this question were as follows:

	Total	Detroit	Outside Detroit
Cut out free service	51%	55%	45%
Raise rates	35	30	43
No opinion	14	15	12

Then this question was asked: — "Supposing they decided they could continue *one* of the free services, but had to cut out the others — which *one* free service would you rather see them keep?"

The answers to this question were as follows:

	Total	Detroit	Outside Detroit
Bulb Exchange	51%	54%	47%
Appliance Repairs	41	36	48
Fuse Replacement	3	4	1

	Total	Detroit	Outside Detroit
Appliance Cord Exchange	2	3	1
No Opinion	3	3	3

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From this survey and from our general conversations with a number of people in the Company, we have the following opinion and recommendations:

1. The Detroit Edison Company should continue the free lamp renewals. This is the service most desired by the public. This public attitude checks with another opinion survey on the same subject in another city. We believe that the free lamp renewal policy helps raise the wattage on lamps used, thus giving better lighting service to the public and resulting in lighting revenues to The Detroit Edison Company considerably above average.

2. It is our opinion that The Detroit Edison Company should continue the servicing of appliances but that a charge should be made for this service.

If this policy should be decided upon by the Company, the public should be fully informed prior to the effective date, carefully pointing out that the Company is faced with such economies as a means of avoiding or diminishing rate increases. Also, it should be mentioned that the decision was reached only after the public opinion survey.

It is believed that when the Company begins to charge for the servicing of appliances part of this servicing naturally will gravitate to dealers. We understand that dealers and independent service organizations now service refrigerators and washing machines and they may welcome • • •

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Exhibit #8 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being Edison's 1970 Customer Survey. This document was Plaintiff's Deposition Exhibit #8.

Memorandum to Mr. Rod K. Herrick

Regarding: *Survey on Use of Customer Offices*

The attached *Survey on Use of Customer Offices* was conducted by Market Analysis during the first week in May, in connection with the study being done by the Customer Office Task Force. The Task Force believed that customer use patterns of DE offices were not incompatible with a new modernized and consolidated Customer Office structure, and it was felt that the Survey would provide factual information which would support this belief.

The results from the Survey indicated that the "average customer" visits an Edison office about three times per year; that there exists a small core of DE customers who have never visited a customer office; and that there exists a small core of DE customers who could be termed "very frequent" users of office services. The data also showed that the primary purpose for office use is for lamp exchange, with appliance repair next in importance and bill payment least important.

While some amount of inconvenience would be unavoidable by any reduction in the number of customer offices, the data indicates that all but the few very frequent users of offices would probably be accommodated by modern centrally-located "Edison Service Centers". This assumes that the "Service Centers" are easily accessible to high traffic shopping center areas, have adequate parking facilities, and provide "complete" customer services. This small group of repeat users who would be most seriously affected in spite of the advantages of the Service Centers, could adjust their habits to exchange bulbs less frequently or, in the case of bill payment, they could be satisfied by the continued use of banks as bill payment agencies. In addition, since the proposed Service Centers would provide

such services as same day appliance repair, the number of visits to the Edison office required per year by the "average" customer actually might be reduced.

In summary there is little evidence from the Survey on Use of Customer Offices which is unfavorable to the implementation of a new and modernized Customer Office structure.

(s) Matthew Piernick
Matthew Piernick
Market Analysis

MP/lk
Copies to: W. R. Milby
S. C. Hetu ✓
G. Matthews
D. Fierz
D. M. Hines

SURVEY ON USE OF CUSTOMER OFFICES

Market Analysis
May, 1970

CONTENTS

I. Purpose of Survey
II. Method
III. Results
A. Brief Summary of Data
B. Office Use
C. Agency Use
D. Bill Payment
E. Bulb Exchange
F. Small Appliance Repair
IV. Questionnaire and Instructions

I. *Purpose of Survey*

The purpose of the survey was to provide basic information on use of customer offices, which could be used by the Customer Office Task Force in conjunction with their study of our Customer Office structure. Areas of exploration included the frequency of use of Edison offices, the amount of use of agencies, and the degree and frequency of utilization of the various services offered in the customer offices.

II. *Method*

A telephone survey of 191 Detroit Edison residential customers from throughout our service area was made during the first week in May. The persons called were a representative sample drawn on a random basis from customer records.

The reliability of the survey results was illustrated by a "stabilization effect" in the data. This method consists of making a survey in parts; analyzing the data of one part; then adding consecutive parts and analyzing the cumulative data. As the results stabilize so that adding more parts will not change the picture significantly, it becomes clear that a larger sample size is unnecessary since it will not increase the reliability of the data significantly.

The Survey on Use of Customer Offices was done in such a manner. Following are examples comparing the results of Part A, containing 97 relies, with the cumulative results of Parts A and B, containing 191 replies. Note that there was very little difference between the two groups, making the addition of a third group unnecessary.

- 2 -

BUSINESS TRANSACTED LAST VISIT (%)

	Bulb Exchange	Pay Bill	Appl. Repair	Bulbs, Bill	Bulbs, Appl. Repair	All Three	Other
A & B	46.1	14.7	11.5	6.3	6.3	1.6	3.7
A	51.5	13.4	10.3	5.2	5.2	2.1	3.1

BULB EXCHANGE FREQUENCY PER YEAR (%)

	5 +-	4 Times	3 Times	2 Times	Once	Less Than Once/Year
A & B	4.2	4.7	9.9	29.8	26.7	11.5
A	4.1	6.2	9.3	32.0	26.8	10.3

APPLIANCE REPAIR FREQUENCY PER YEAR (%)

	4 +-	3 Times	2 Times	Once	Less Than 1	Never
A	0.0	3.1	9.3	23.7	40.2	23.7
A & B	0.5	2.6	9.4	21.5	35.6	30.4

HOW PAY BILLS? (%)

	Edison Only	Bank Only	Mail Only	Agency Only (Not Bank)	Comb. W/DE	Comb. W/Out DE
A	12.4	23.7	26.8	6.2	19.6	11.3
A & B	13.6	19.9	31.4	7.3	18.8	8.9

- 3 -

III. *Results*

A. *Brief Summary of Data*

— 35% of customers have visited a DE office in the last month,

— 38% of customers have not been in a DE office for at least 6 months, and

— 10% have *never* used DE offices

— The "average customer" exchanges bulbs twice per year,

— 6% of customers buy their bulbs at the store, and

— 5% exchange at agencies

— The "average customer" has a small appliance repaired less than once per year, and

— 30% of customers have *never* had an appliance repaired at a DE office

— Only 14% of customers pay bills exclusively at DE offices, and

— 68% *never* pay at DE offices.

- 4 -

B. *Office Use*

1. *Purpose of visits* — By asking the customer what business he transacted *on his last visit,* a representation of what an Edison office is usually used for was constructed. The results:

— 60% exchanged bulbs on their last visit

— 23% paid a bill on their last visit

— 19% had an appliance repaired on their last visit

— 4% visited for "other" reasons

— 10% had never visited an Edison office

2. *Frequency of visits* — By asking the customer when he had last visited an Edison office, the following results were obtained:

LAST VISIT

One Month Ago Or Less	2 - 5 Months	6 Months or More	Never
35%	27%	28%	10%

The customer was also asked, "How many times per year do you usually exchange bulbs at an Edison office?" Replies indicate 19% exchange bulbs 3 times per year or more, and 81% exchange them twice a year or less. A weighted average was constructed which showed that the "average customer" exchanges bulbs slightly less than twice per year. (In both this and the following example, the weighted averages were constructed excluding those who never used the service, making the average use figures slightly high.)

Another question was, "How many times per year do you usually have a small appliance repaired at an Edison office?" Thirty-four percent

replied with once a year or more, 36% answered less than once per year, and 30% said they never had a small appliance repaired at an Edison office. Again, a weighted average was constructed, which showed that the "average customer" had a small appliance repaired slightly less than once per year.

Assuming two visits to the Edison office for each appliance repair, and assuming that one of these visits coincided with a visit for bulb exchange, the "average" Edison customer visits a DE office about 3 times per year.

C. *Agency Use*

1. For bill payment — 20% of those surveyed use banks exclusively to pay their bill and 7% use other agencies.
2. For bulb exchange — 5% of those surveyed exchange bulbs at a DE agency.
3. For appliance repair — 2% of those surveyed use agencies for appliance repair purposes.

D. *Bill Payment*

1. Methods used for bill payment, overall:

— 14% of customers surveyed pay their bill only at a DE office.

— 20% pay only at a bank

— 31% pay only by mail

— 7% pay only at an Agency (not including banks)

— 19% use some combination of the above, *including* a DE office.

— 9% use a combination of the above *not* including a DE office.

Since only 14% *always* use a DE office for bill payment, it is presumed the other 86% will not be affected greatly by any reduction in offices as far as bill payment goes. It is felt that banks or mail service would most probably provide adequate convenience for those of the 14% who would be affected by any consolidation of offices.

2. Methods used for payment by Division: The following table presents percentage breakdown of how bills are paid, by division:

	DE Office Only	Bank Only	Mail Only	Agency Only (Exclude Bank)	Comb. With DE Office	Comb. Without DE Office
Detroit-Wayne	13%	29%	32%	3%	13%	10%
Oakland	18	6	24	12	27	12
Macomb	4	12	48	4	28	4
Ann Arbor-Monroe	15	0	31	23	23	8
Thumb	31	19	21	10	17	2
TOTAL	14%	20%	31%	7%	19%	9%

* This figure includes 37 interviews from a supplementary survey of the Thumb which was made in order to bolster data accuracy for that area. The totals however, covers only the 191 responses in the main survey.

Note that:

— The highest incidence of bill payment at a *DE office* is in the Thumb (31%).

— The highest incidence of bill payment *at a bank* is in Detroit-Wayne (29%).

— The highest incidence of bill payment *by mail* is in Macomb (48%).

— The highest incidence of bill payment in an *Agency* (not including banks) is in Ann Arbor-Monroe (23%).

3. As expected, the data also showed that those who use DE offices for bill payment also tend to utilize other office services more frequently than those who pay their bill by other means.

For example, people who always or sometimes pay their bill at an Edison office also utilize Detroit Edison's appliance repair service more frequently than those who never pay bills at Edison offices. However, it is unclear which is the cause and which is the effect among these factors. (See following table)

FREQUENCY OF APPLIANCE REPAIR (%)

Use of DE Office To Pay Bills	Never	Less Than 1 Per Year	1 Per Year	2 or More Per Year
Always and sometimes	15%	42%	24%	19%
Never	38%	33%	20%	9%
SAMPLE	58 (30%)	68 (36%)	41 (21%)	24 (13%)

In the same manner, the following table shows that those who pay their bills at an Edison office either some of the time or always, are also more likely to be frequent users of the bulb exchange service than those who never pay bills at a DE office:

Use of DE Office to Exchange Bulbs	Never	Less Than 1 Per Year	1 Per Year	2 Per Year	3 or More Per Year
Always and Sometimes	0	10%	24%	32%	34%
Never	19%	12%	28%	29%	12%
Sample	25 (13%)	22 (11%)	51 (27%)	57 (30%)	36 (19%)

E. *Bulb Exchange*

1. Methods used for exchange:

— 83% of those surveyed exchange bulbs at an Edison customer office.

— 6% purchase new bulbs

— 5% use an Edison agency to exchange bulbs

— 4% use some combination of the above, *including* exchange at an Edison office.

— 2% have never had occasion to get new bulbs.

2. Frequency of bulb exchange. As previously mentioned (under the section on Frequency of Office Visits) the following information was found on frequency of bulb exchange:

BULB EXCHANGE FREQUENCY PER YEAR

5 Times Or More	4 Times	3 Times	2 Times	Once	Less Than One Per Year	Never
4%	5%	10%	30%	27%	11%	13%

It was also mentioned that the "average customer" exchanged bulbs slightly less than twice per year (excluding those who *never* exchange). Following is a breakdown of average visits per year *by Division*:

— *Detroit-Wayne* customers exchange bulbs at an average of *1.6* times per year (about every 7½ months)

— *Macomb* customers exchange at an average of *1.9* times per year (about every 6 months)

— *Ann Arbor-Monroe* customers exchange at an average of *2.2* times per year (about every 5½ months)

— *Oakland* customers exchange at an average of *2.6* times per year (about every 4½ months)

— *Thumb* customers exchange at an average of *2.7* times per year (about every 4½ months)

This compared with a system-wide average of *1.9* times per year, which is about every 6 months.

F. *Small Appliance Repair*

1. Methods used for repair — *70%* of those surveyed had utilized the Detroit Edison Small Appliance Repair Service available at customer offices, and another *2%* had used a DE agency for this purpose. The remaining 28% had never used the Small Appliance Repair Service, either at a Customer Office or an Agency.

2. Frequency of appliance repair, overall and by Division. As mentioned previously, (under the section on frequency of office visits) the following information was found regarding frequency of small appliance repair:

SMALL APPLIANCE REPAIR FREQUENCY PER YEAR — (DE Office)

3 Times or More Per Year	2 Times	Once	Less Than One	Never
3%	9%	22%	36%	30%

It was also mentioned that the "average customer" had a small appliance repaired slightly less than once per year (excluding those who never used this service). Following is a breakdown of average appliance repair per year *by Division*:

— *Macomb* customers have a small appliance repaired on an average of *0.8* times per year (about every 15 months)

— *Detroit-Wayne* customers have a small appliance repaired on an average of *0.9* times per year (about every 13 months)

— *Oakland* customers also have an appliance repaired on an average of *0.9* times per year (about every 13 months)

— *Ann Arbor-Monroe* customers likewise have appliances repaired on an average of *0.9* times per year, or about every 13 months.

— *Thumb* customers have an appliance repaired on an average of *1.1* times per year, or about every 11 months.

3. *General*

As expected, it was found that customers who have had small appliances repaired at an Edison Customer Office are much more likely to have also used the Office for bill payment and bulb exchange on some occasion. Of those who *have* had appliances repaired, 92% have exchanged bulbs and 40% have paid a bill at an Edison office at least occasionally. On the other hand, of those who have *not* had an

appliance repaired at a DE office, only 60% have exchanged bulbs and only 16% have paid a bill there.

M. Piernick
7/9/70

SURVEY ON USE OF CUSTOMER OFFICES
APRIL 1970
INSTRUCTIONS TO INTERVIEWERS

This is a telephone survey being made to give us information about our Customer Offices and their use by our customers.

The questions should be asked of the respondent as they are written on the interview form. However, when clarification is needed by the respondent additional information can be given following the guidelines of these instructions.

1. If the respondent asks the purpose of the questions, reply that this is part of a study made periodically about our Customer Offices and the services we offer. (IF THEY INQUIRE FURTHER) We do this so that we may keep informed of what is happening in our offices, and what they are being used for most frequently. Information gathered from the survey will be summarized and used as a basis for future planning.

2. If the respondent asks how he was chosen, he was chosen from a random sample of our customer files.

3. An *Agency* can be described as a Commercial establishment that is not an Edison office but that is authorized to conduct certain transactions on behalf of the Edison Company, such as bill payment, bulb exchange, or receiving appliances for repair. Agencies may include drug or hardware stores, appliance stores, banks, or grocery stores.

4. If extra information is offered which you feel is pertinent, write it in in the margin or spaces between questions.

5. The remainder of these instructions will deal with clarifying the individual questions of the questionnaire form. The numbers will correspond with the Question number. Read the question, then the clarification.

Q.1. (READ QUESTION) If the customer cannot come up with a specific answer in months, prompt him into estimating when the last visit was. If he gives an answer of "last December" or "last September" be sure to convert this to "4 months ago" or "7 months ago". Then continue with the remainder of the questions in the first box (Questions 2, 3, 4 and 5). Do *not* ask the questions in the second box at the bottom of the page unless the customer answers "NEVER" to this first question. If they do answer NEVER ask *only* the questions in the second box (Questions 2A, 3A, and 4A). Arrows are provided to remind you which set of questions to ask.

Q.2. (READ QUESTION) If the respondent does not know the office name ask him the intersection where the office is located, and place this information in the appropriate blank. If respondent gives an agency rather than an office, be sure his last visit to an *office* is recalled. Use information about the *agency* in Question 5.

Q.3. (READ QUESTION) Check the appropriate responses (more than one may be given). You may clarify the question to the respondent by reading the possible responses if it is necessary. Be sure to write in if any other reasons besides those listed are given.

Q.4. (READ INSTRUCTIONS) There are 3 parts of Question 4, dealing with bill payment, bulb exchange, and appliance repair. The way each part of the question is asked by you will be determined by wheth-

er or not bill payment, bulb exchange, or appliance repair has been checked in Question 4.

For each response which has been checked in Question #3, ask the appropriate question from the *left* side of Question 4 (READ QUESTION). For example, if *exchange light bulbs* had been checked in Question #3, you would ask, "How many times per year do you usually exchange light bulbs at an Edison office." On the other hand, if *exchange light bulbs* had *not* been checked in Question #3 you would select the appropriate question from the *right* side of Question #3 which would be "Do you ever exchange bulbs at an Edison office?" The same goes for the questions dealing with appliance repair and bill payment.

A suggestion to eliminate confusion would be to deal first with all those responses which *have been checked* in Question #3, by asking the proper questions on the left; then ask the questions on the right for those which haven't been checked in Question #3.

Q.5. (READ QUESTION) The purpose of this question is to determine whether the customer ever uses an *agency* (refer to definition in #3 above). If after you read the question to the respondent, he does not understand it, you may clarify it by giving examples of an agency such as drug stores or banks. Obtain the name of the agency, or the type of agency if the name is not available.

SECOND BOX

Q.2A. (READ QUESTION) Check whether the bill is paid by mail or by other means, such as an agency, and specify.

Q.3A. (READ QUESTION) Possible answers could be, "Purchase them", "landlord furnishes them", "neighbor exchanges them, etc." Please write in.

Q.4A. (SAME AS Q.5 ABOVE)

Remember to be courteous at all times and to thank the respondent when you are finished. If any questions about service, rates, etc., arise which you are unable to answer, ask the respondent if he could please call his local Edison office, and they will be glad to help him. In the event you are unable to fill in the questionnaire form completely during the phone interview, be sure to take time between calls to record all the pertinent information. Try to write neatly but don't be afraid to make corrections on the form if necessary.

4/70
M. Piernick

Exhibit "8"

SURVEY ON USE OF CUSTOMER OFFICES
APRIL 1970

NAME | STREET | CITY

PHONE | INTERVIEW NO. | DATE | INTERVIEWER'S NAME

Hello, this is _____ at Detroit Edison. We are calling some of our customers about their use of our neighborhood Edison offices. Is this the _____ residence on _____ street?

Q.1. When did you (or someone from your home) last visit an Edison office?

☐ months ago (continue with questions in first box) ☐ Never (If Never ask only questions in 2nd box)

Q.2. What office was that? _____

Q.3. What business did you transact at that time? (check any given)

☐ exchange light bulbs
☐ small appliance repair
☐ pay bill
☐ any other _____ WHAT?

Q.4. (If answer is checked in #3) — OR — (If answer is not checked in #3)

How many times per year do you usually exchange bulbs at an Edison Office? ☐

Do you ever exchange bulbs at an Edison Office? ☐ Yes ☐ No
(If YES) How many times per year? ☐
(If NO) How do you get new light bulbs?

How many times per year do you usually have a small appliance repaired at an Edison Office? ☐

Do you ever have small appliances repaired at an Edison Office? ☐ Yes ☐ No
(If YES) How many times per year? ☐

Do you always pay your electric bill at an Edison Office? _____ (If NO) How else do you pay your Edison bill? _____

Do you ever pay your electric bill at an Edison office? ☐ Never ☐ Sometimes ☐ Always
(If NEVER) How do you usually pay it?
(If SOMETIMES) How often? ____ and How else do you pay it? _____

(If an AGENCY has not already been mentioned)
Q.5 Do you ever transact Edison business somewhere other than at an Edison office? ☐ Yes ☐ No

If YES, where? _____ for what? _____ how often? _____

THANK YOU.

Q.5a. Do you usually pay your electric bill by mail, then? ☐ by mail
☐ Other _____ (How)

Q.5b. How do you usually get new light bulbs? _____

Q.6a. Do you ever transact Edison business somewhere other than at an Edison office? ☐ Yes ☐ No

If YES, where? _____ for what? _____ how often? _____

4/70
M. Pivovick

Exhibit #9 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being the 1972 "spread sheet" described in the deposition of Mr. Daniels. This document was Plaintiff's Deposition Exhibit #3.

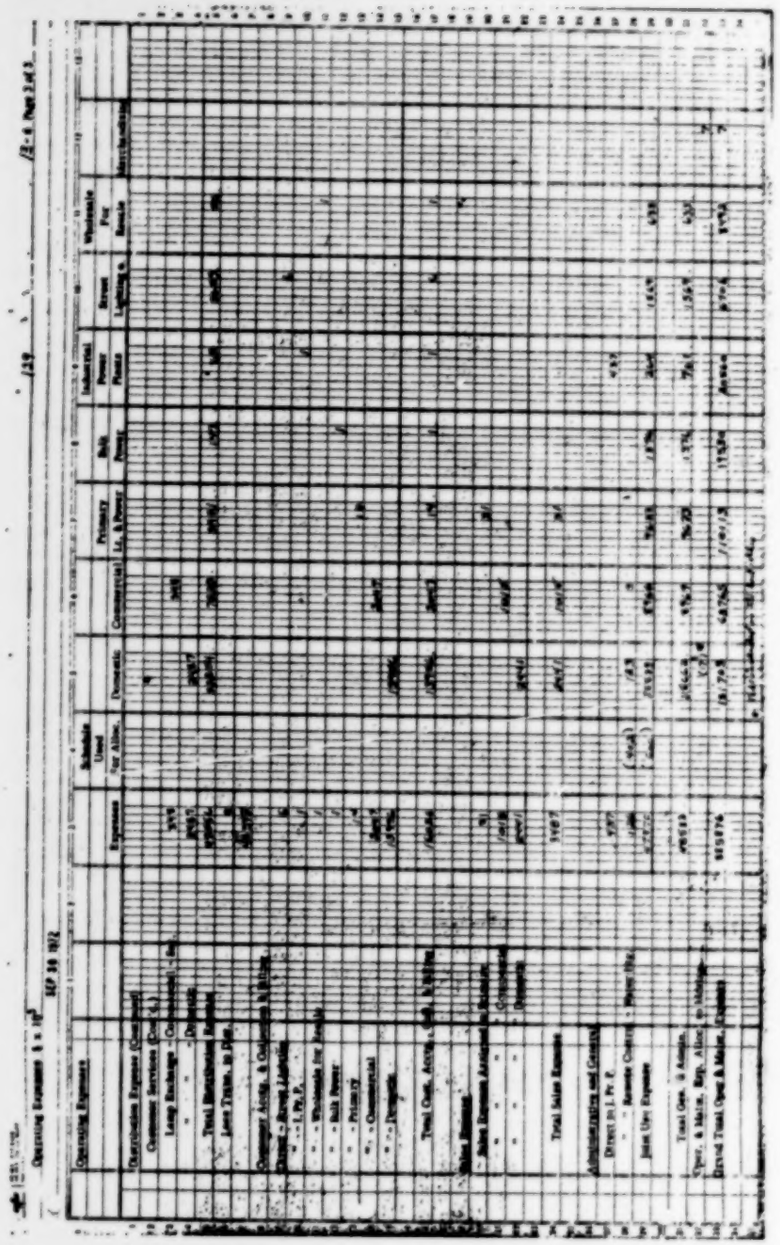


Exhibit "9"

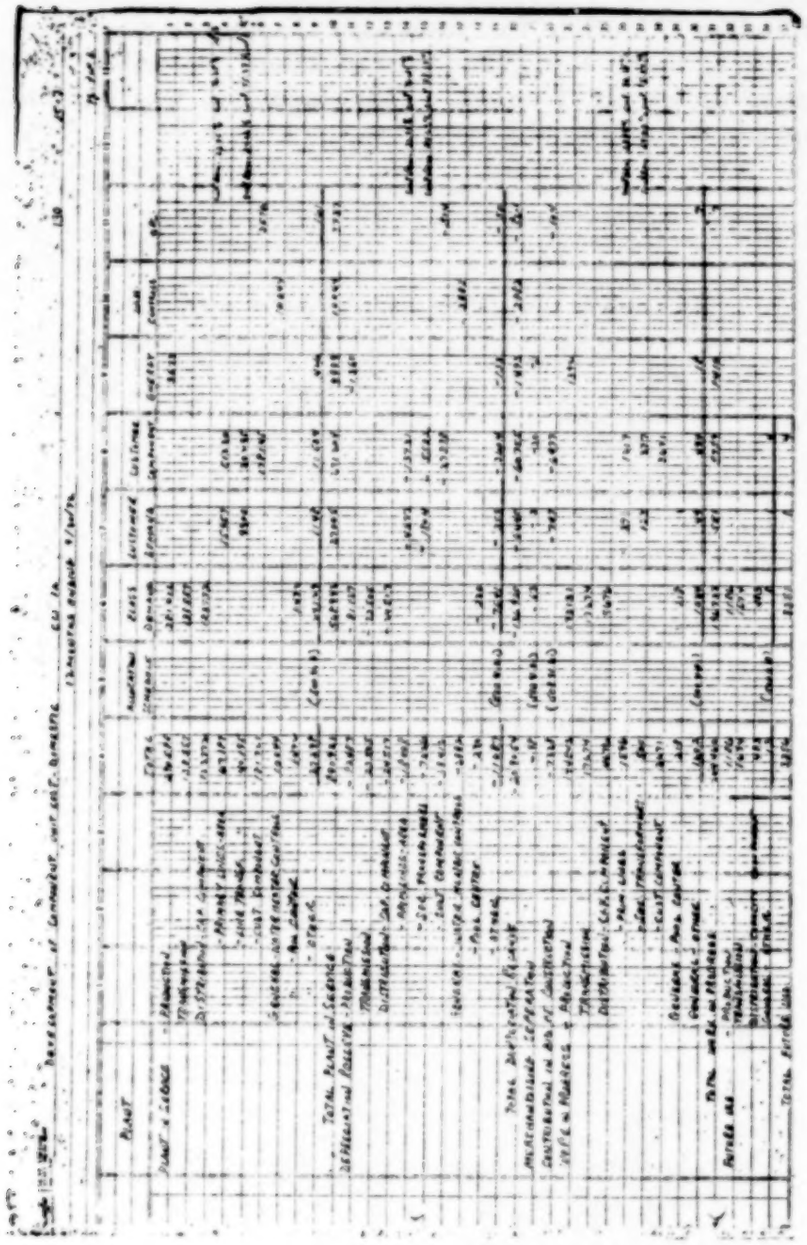
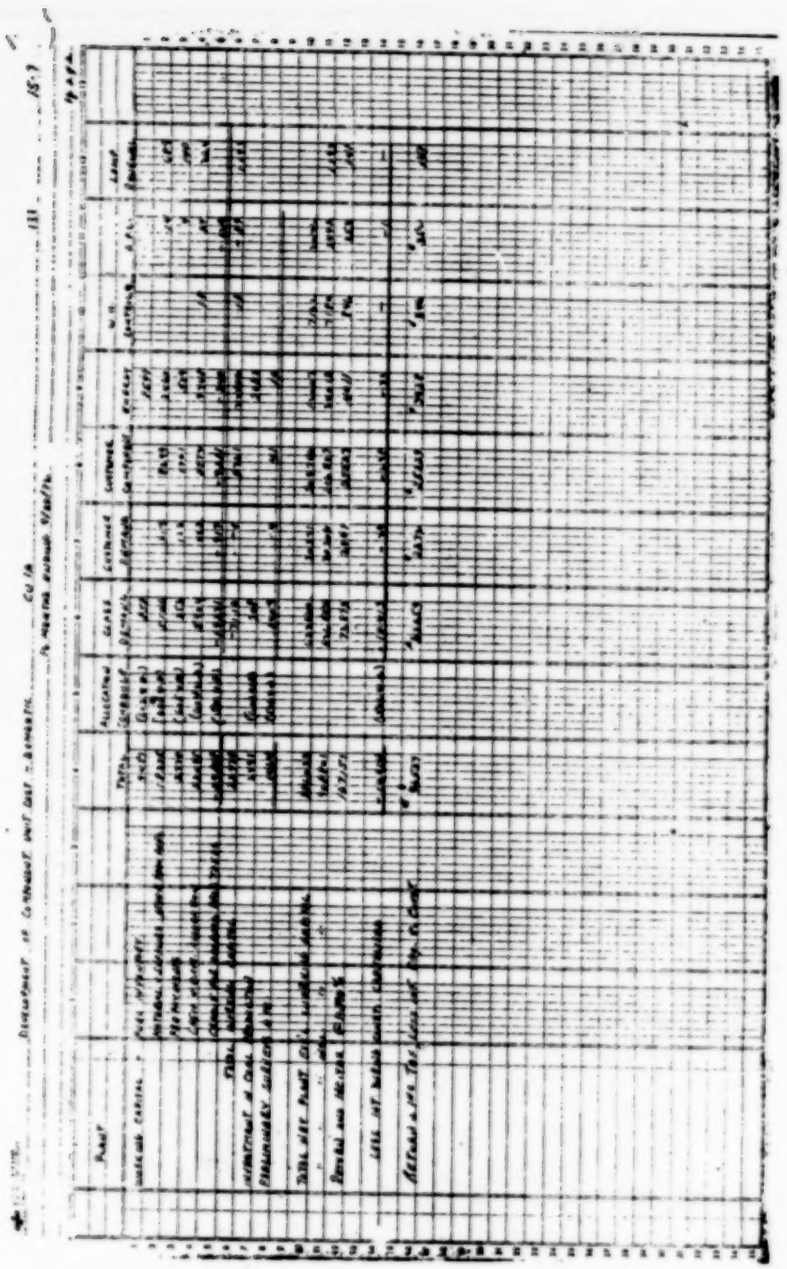


Exhibit "9"



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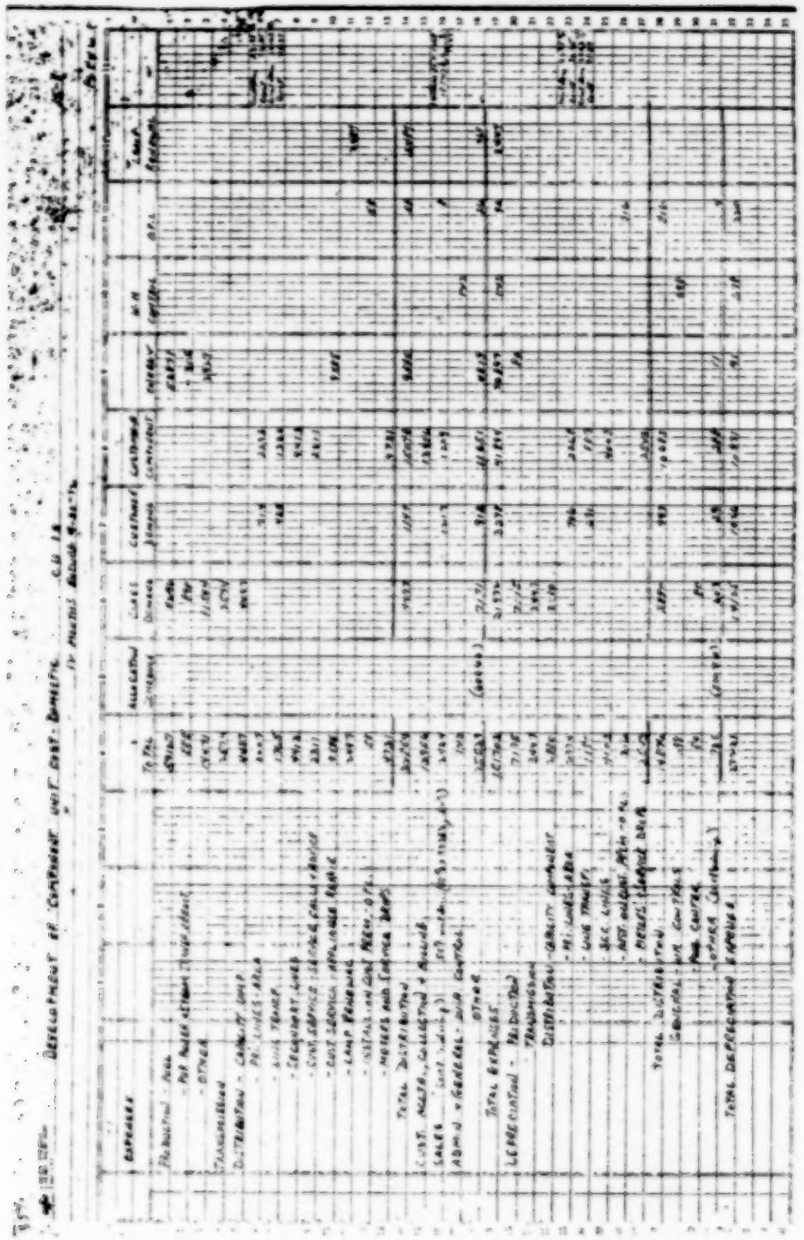

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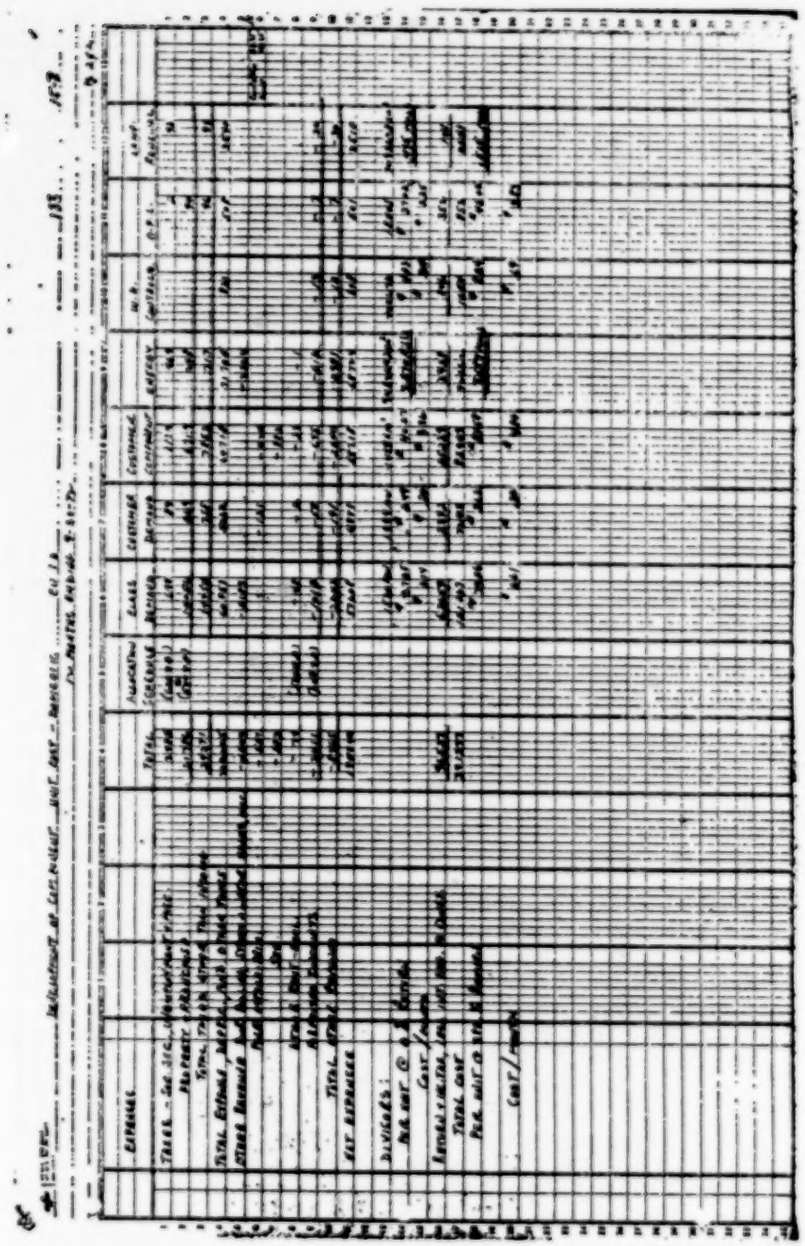
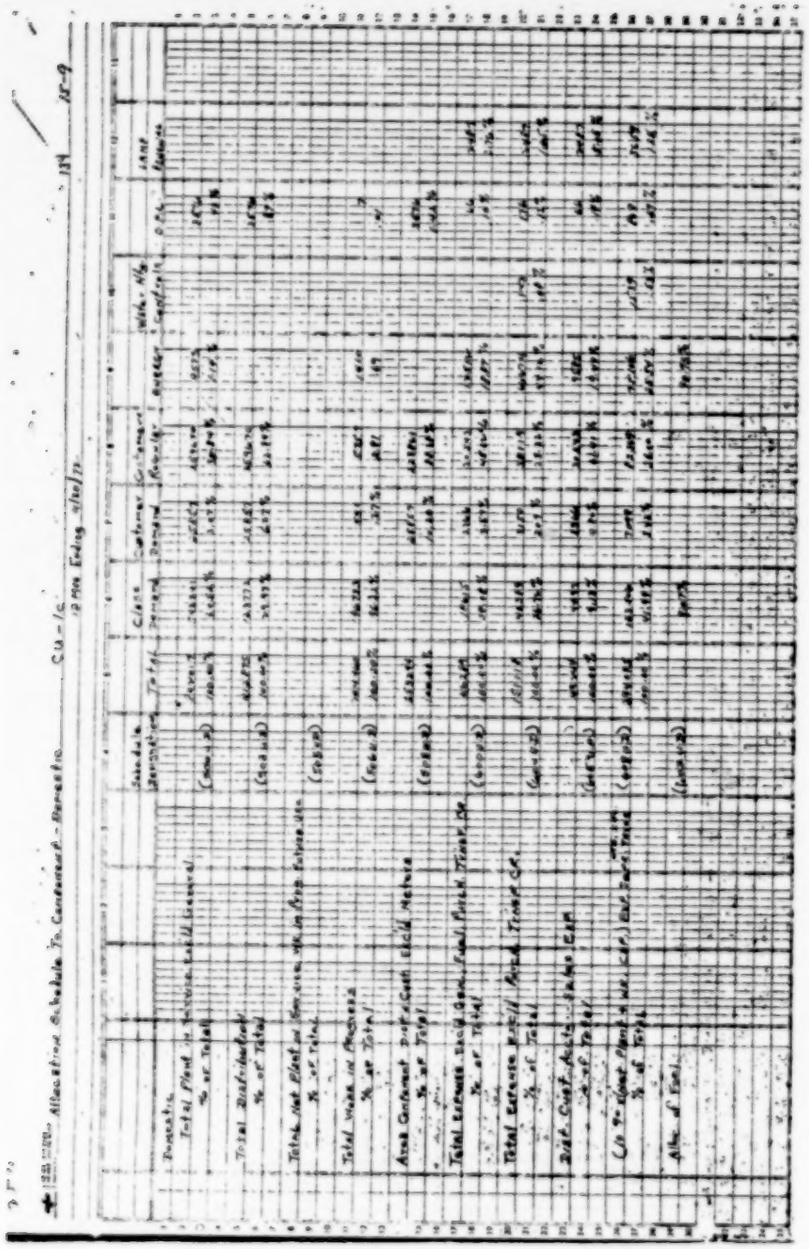


314a

Exhibit "9"



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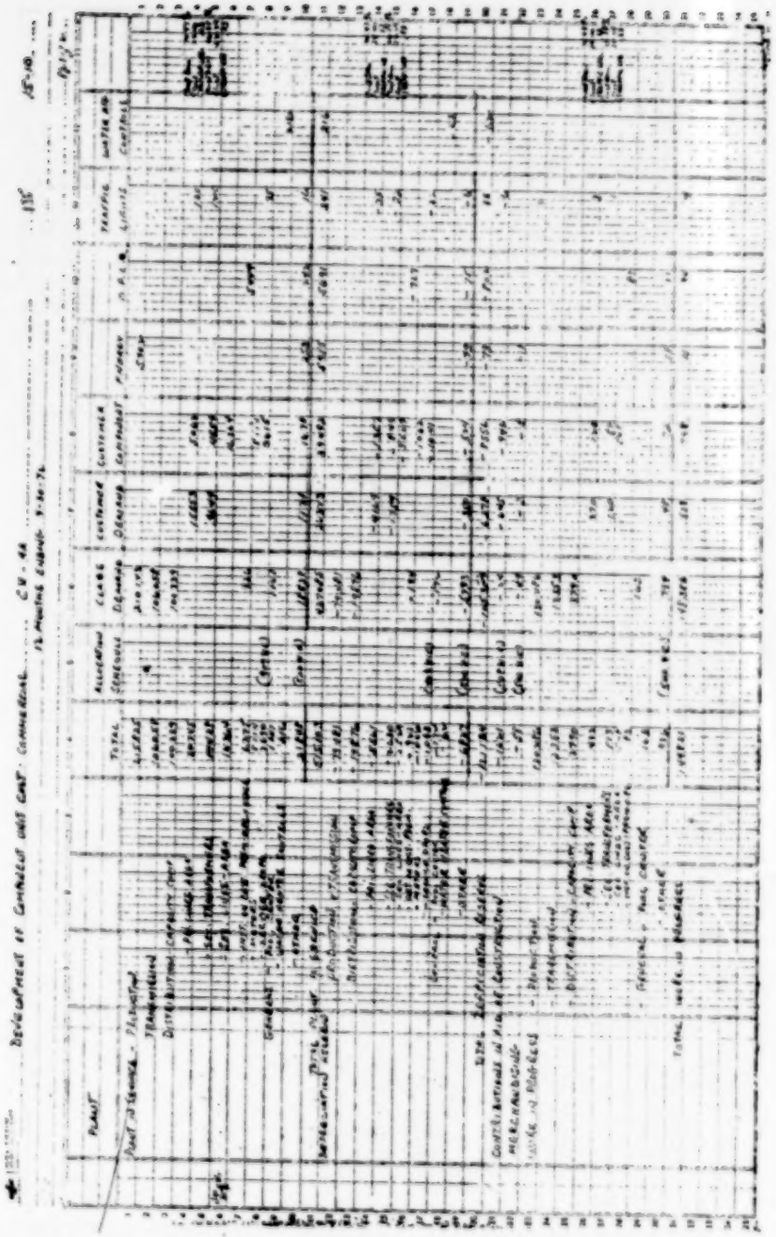

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316a

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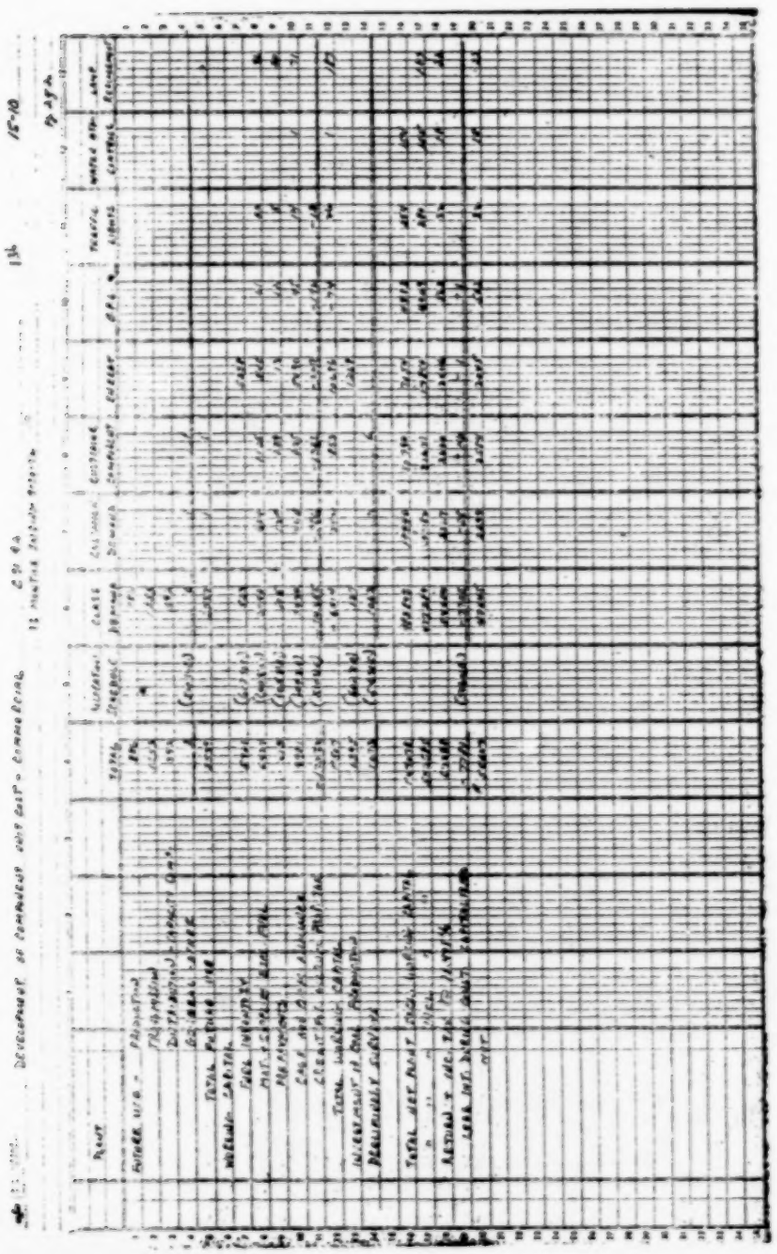

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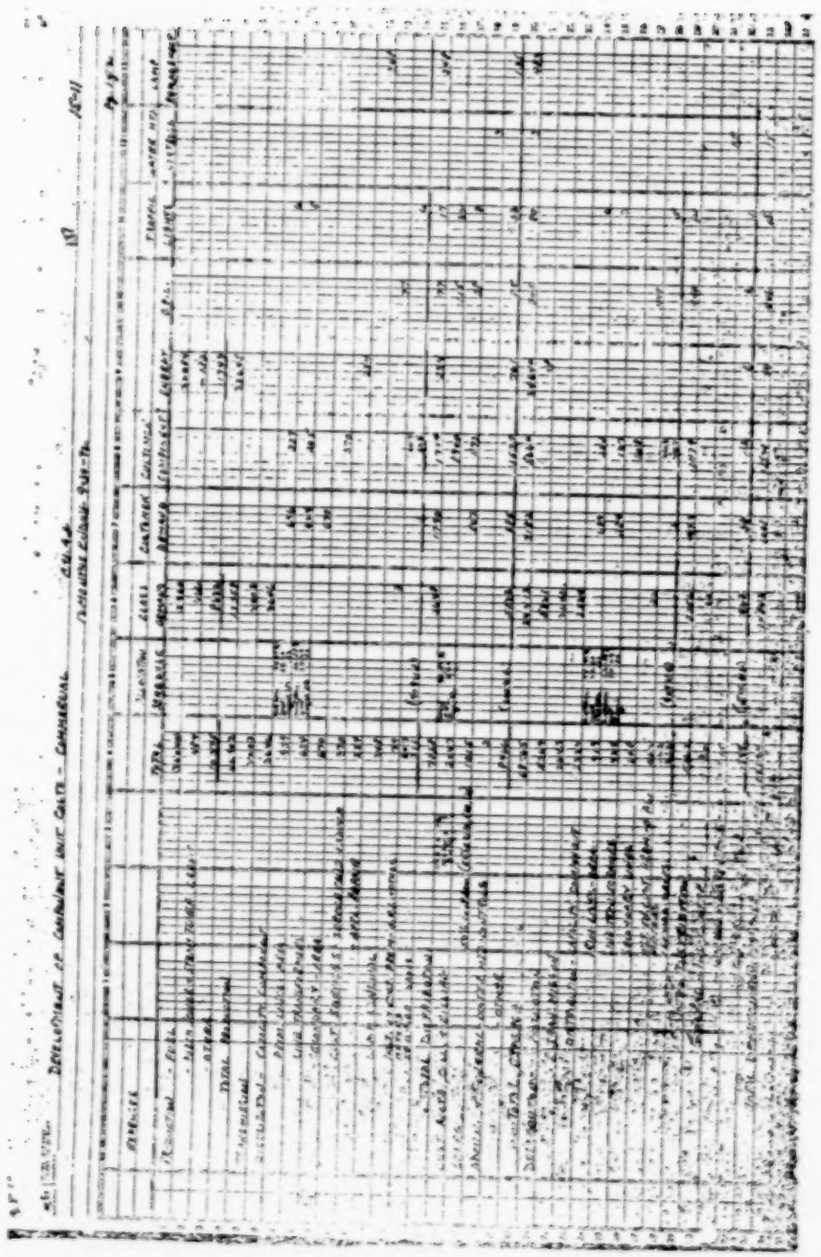

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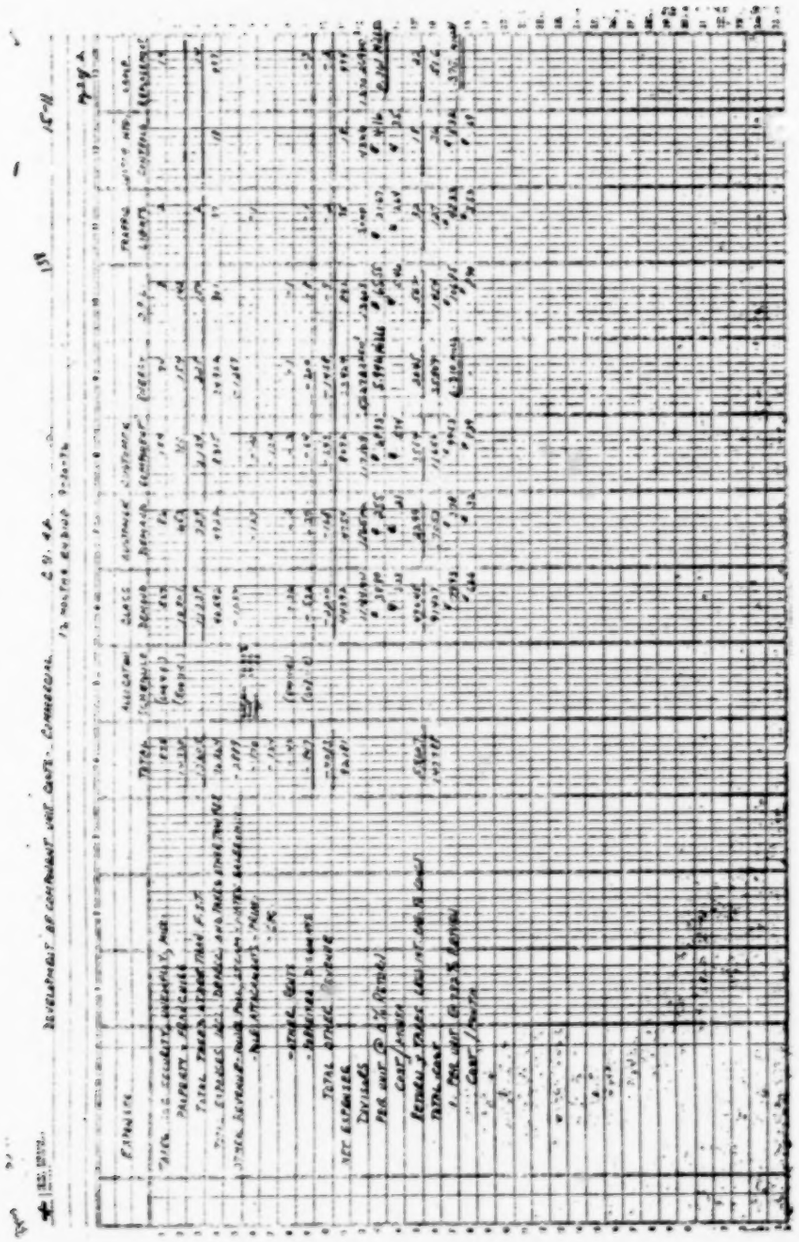

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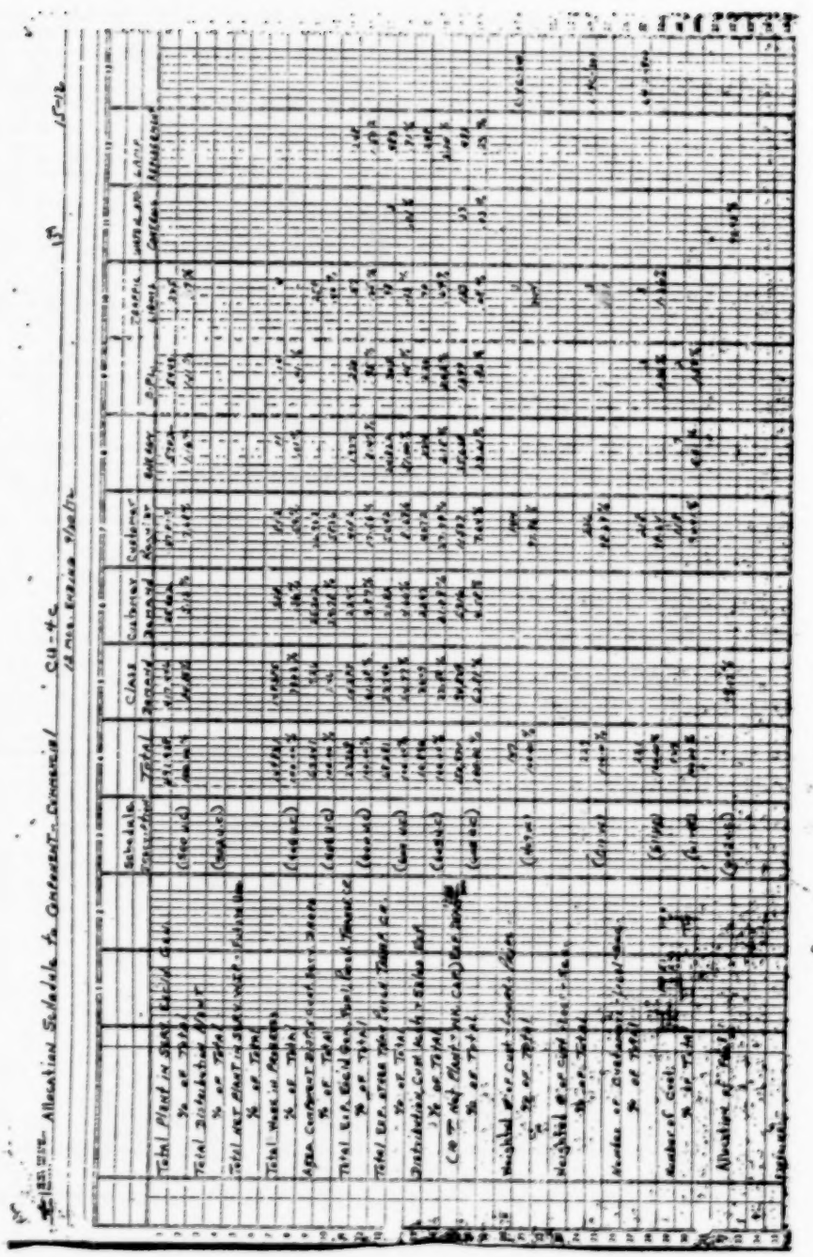

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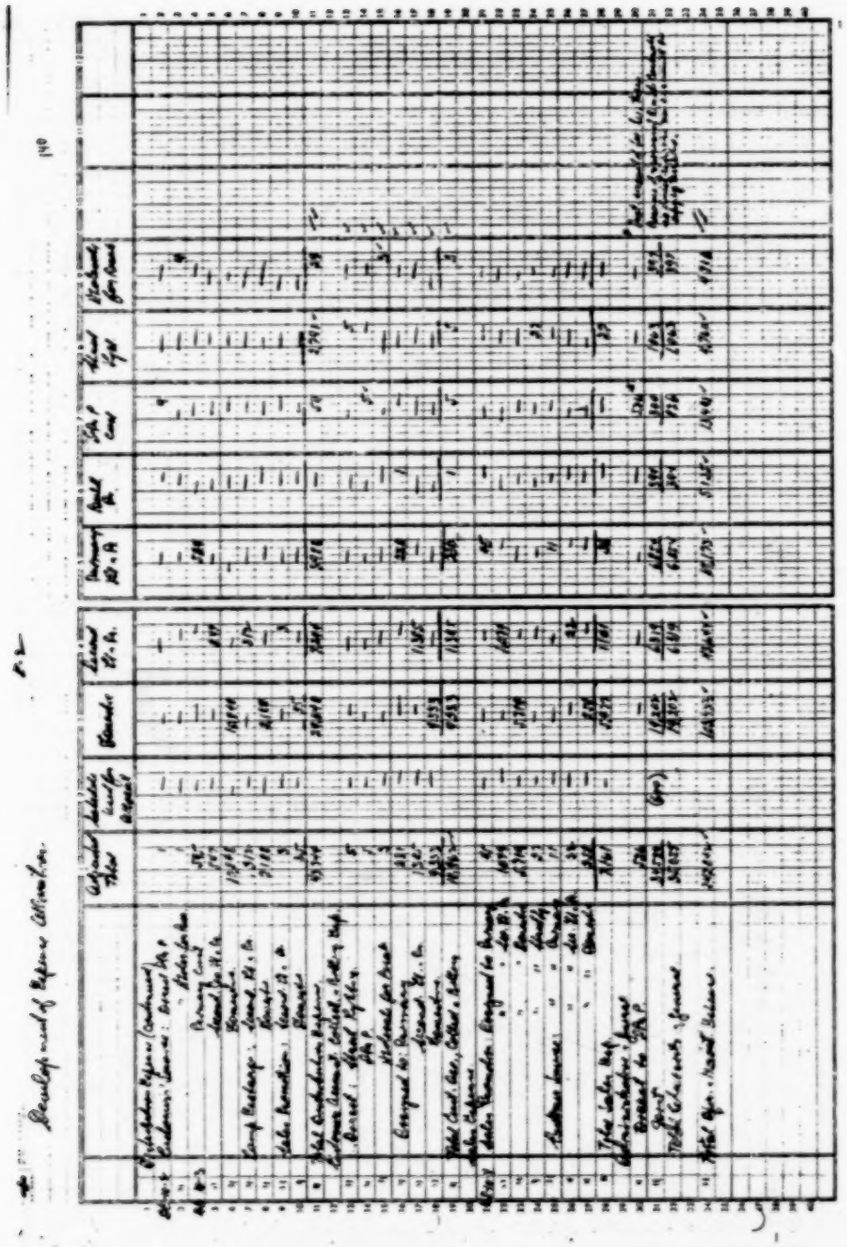

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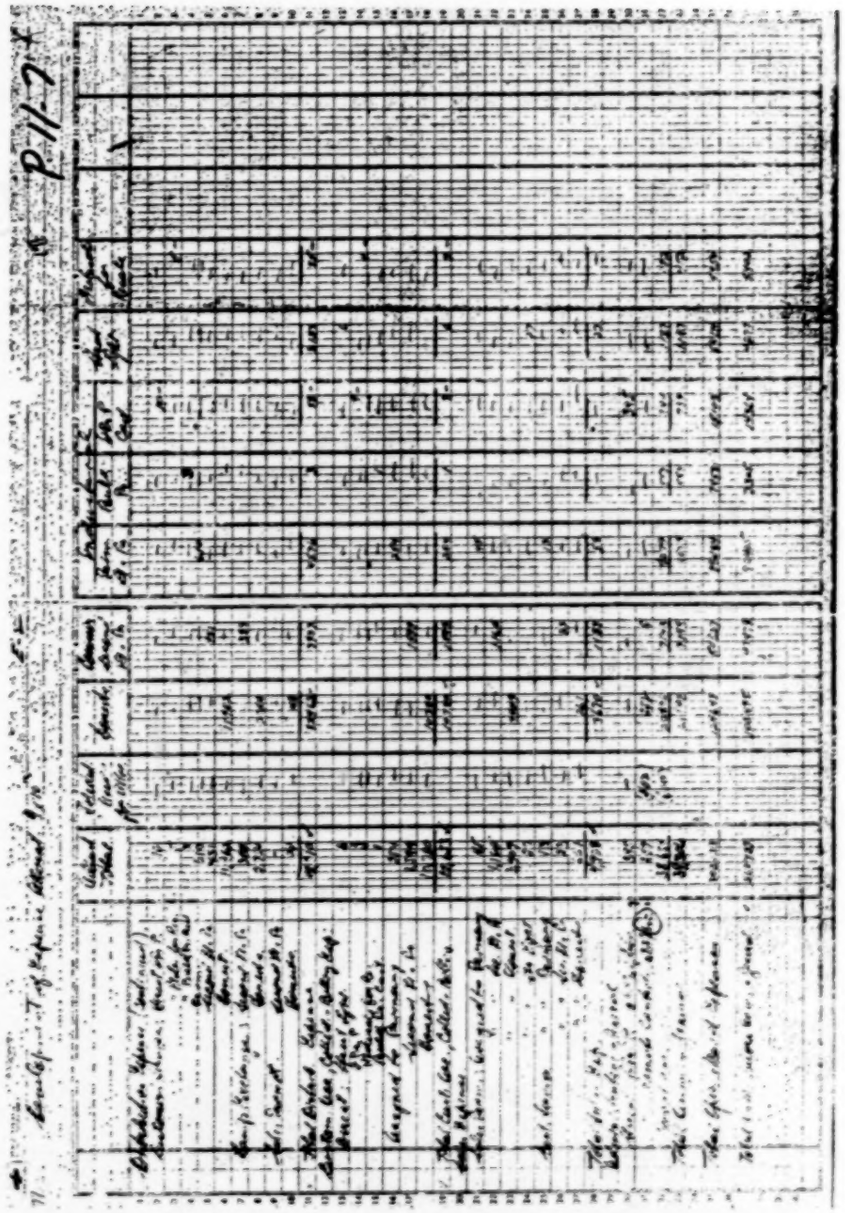

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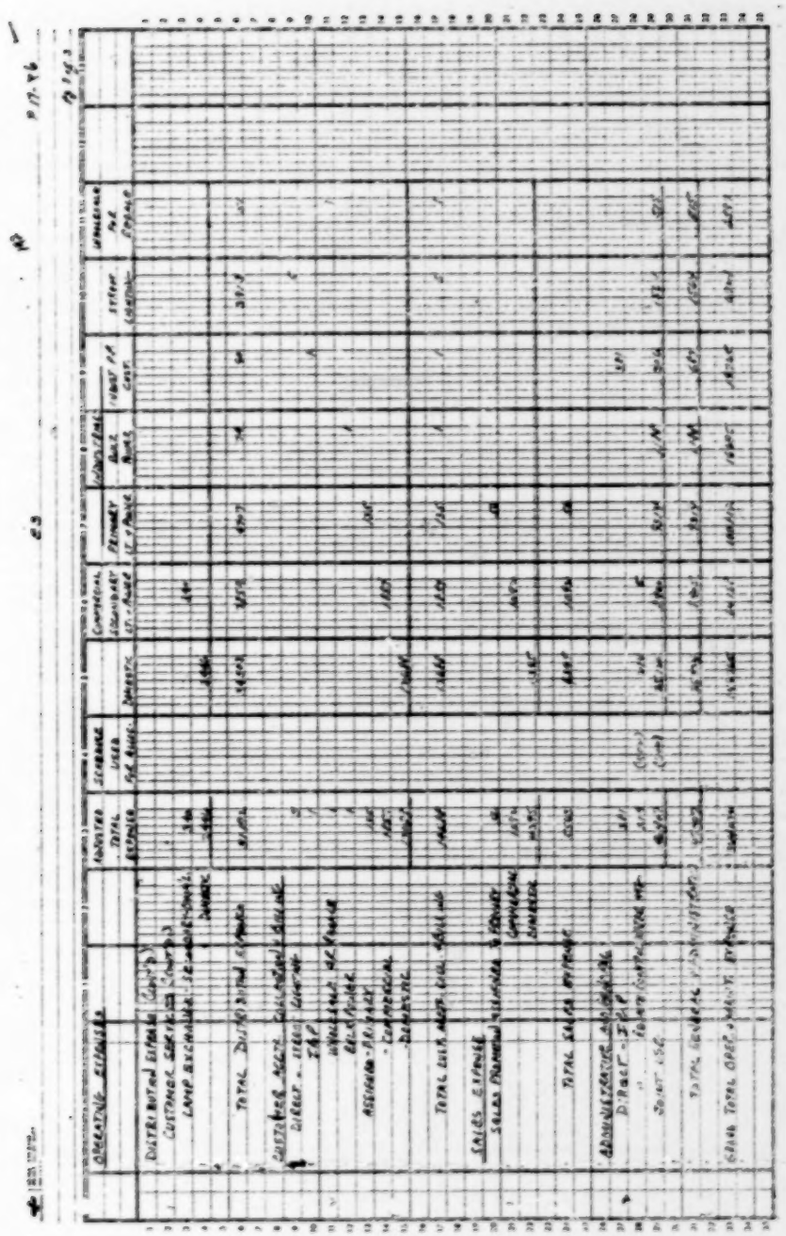

Exhibit "10-A"

Exhibit #10-A to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a jacket of Edison's 100 watt bulb.

DETROIT

An Extra Edison Service

EDISON

DETROIT EDISON

100 WATT BULB

Avg. Life-1350 Hours

Avg. Light Output-1620 Lumens

DETROIT

MANUFACTURED FOR DETROIT EDISON BY GENERAL ELECTRIC CO.
NELA PARK CLEVELAND, OHIO 44112

EDISON

DETROIT EDISON

100 WATT BULB

Avg. Life-1350 Hours

Avg. Light Output-1620 Lumens

Exhibit "10-B"

Exhibit #10-B to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March 11, 1974, Being a jacket of a commercially available 100 watt bulb.

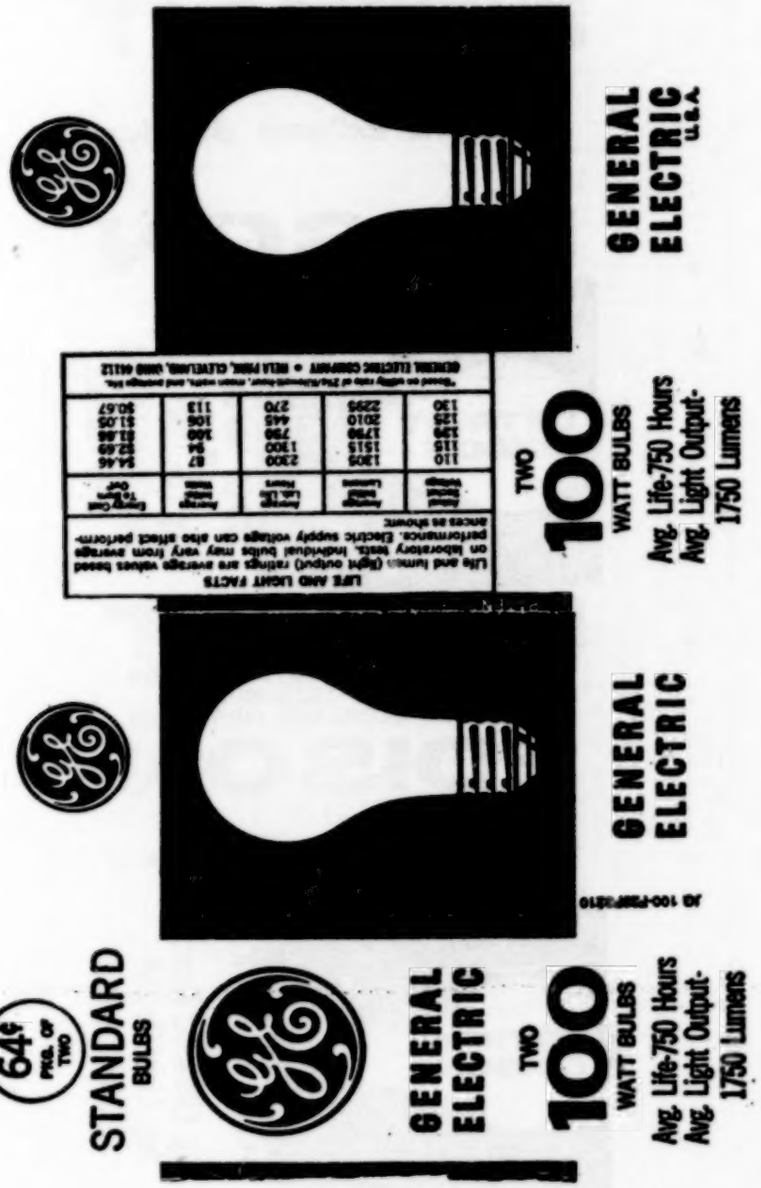

Exhibit "11"

Exhibit #11 to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed March, 11, 1974, Being a letter from F. M. Hoppe, Director of Public Utilities MPSC dated October 26, 1972.

(Letterhead of the State of Michigan — Department of Commerce)

October 26, 1972

Re: ED2-4-Deitch

Mr. Laurence B. Deitch
Rothe, Marston, Mazey, Sachs, O'Connell,
Nunn & Freid, P.C.
Attorneys and Counselors at Law
1000 Farmer
Detroit, Michigan 48226

Dear Mr. Deitch:

This will acknowledge your letter of October 18, 1972, concerning a profit and loss statement of The Detroit Edison Company broken down to show individual expense items. Our accountants have audited the books and records of The Detroit Edison Company, but no such document was prepared.

The cost of The Detroit Edison Company's light bulb exchange program is included in Account No. 587, Customer Installation Expense, of the Uniform System of Accounts as prescribed by this Commission and is included in the company's operating expenses when determining its revenue deficiency when this Commission determines the proper level of rates.

Sincerely,

(s) F. M. Hoppe
F. M. Hoppe
Director of Public Utilities

Exhibit B to the Affidavit of Jack E. Menig filed March 25, 1974, Being "Motion for Rehearing based upon facts arising subsequent to the Hearing" in MPSC Case No. U-3910.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of
THE DETROIT EDISON COMPANY for authority
to amend its rate schedules governing Case U-3910
the supply of electric energy

MOTION FOR REHEARING
BASED UPON FACTS ARISING SUBSEQUENT
TO THE HEARING

Now come FRANK J. KELLEY, Attorney General, UAW—MICHIGAN CAP, CITY OF DETROIT and COUNTY OF WAYNE, and move pursuant to the fourth sentence of Rule 52 for rehearing of this Commission's rate increase order of August 18, 1972, based upon facts arising subsequent to the issuance of said order.[1]

The reasons and basis for this motion are as follows:

1. On information and belief, an officer of the Detroit Edison Company, William R. Milby, Assistant Vice President in charge of customer services, stated to the press on September 5 and/or 6, 1972, that:

---

[1] This application for rehearing is not based upon claim of error in the commission's order of August 18, 1972; movants reserve full rights to present all claims of error to the Circuit Court for the County of Ingham, pursuant to applicable statutes governing the appeal of Commission orders.

a. Edison is incurring an annual net loss of $10 million by reason of its appliance repair service.

b. On or before January 1, 1973, Edison will increase its appliance repair charges so as to place the repair service on a "break-even" basis.

On information and belief, the report carried in the Detroit News of September 6, 1972, page 6A, a copy of which is attached hereto as Exhibit A, accurately sets forth the statement made to the press by said William R. Milby. A similar report in the Detroit Free Press of September 7, 1972, State edition, page A-1, is attached hereto as "Exhibit B".

2. On information and belief, Edison, for many years, upwards of 30 years, has provided to its residential customers electric appliance repair service at no additional charge, or at charges representing only part or all of the actual cost of parts in making such repairs. No charge has been or is being made for the labor cost involved in making such repairs.

3. The cost of making said repairs has for many years been recorded by the Detroit Edison Company on its books as a utility expense, as part of the cost of rendering electric service to its customers. The entire amount of said expense has been claimed by Detroit Edison, and allowed by the Public Service Commission, as part of the cost of rendering electric utility service. The full amount of such costs was allowed, and included in Edison's rates, in the three most recent cases involving the electric rates of the Detroit Edison Company, to wit: Docket Nos. U-3189 (June 15, 1970); U-3697 (December 21, 1970); and U-3910 (August 18, 1972).

4. The residential customers of Edison are now paying the full cost of the appliance repair service in their rates and charges, pursuant to this commission's $45.2 million rate increase order of August 18, 1972, which rate increase became effective August 19, 1972.

5. In the Commission's said order of August 18, 1972, Edison's rates to its residential customers were increased 10.9%, or $23,627,965, based upon the Company's alleged revenues, expenses, and investment in the "test year", 12

months ending June 30, 1971. Imposition of an additional $10 million in appliance repair charges would have the effect of increasing said rate increase incurred by the residential customers by 42.3%, making the total percentage rate increase 15.5%, in lieu of the 10.9% increase authorized by the commission's order of August 18.

6. On information and belief, Edison has never filed rate schedules with this commission showing the rates charged for appliance repair service, or setting forth those repair services which are free of charge. Nevertheless, the Attorney General believes that the charges for appliance repair service constitutes "rates" or "charges", within the meaning of Section 6(a) of the Public Service Commission Act, 1939 PA 3, CL 1948 460.6(a), MSA 22.13(6a); *and that such rates and charges cannot legally be imposed or increased without giving notice* in the service area to be affected and the holding of a public hearing, as required by said Section 6a.

WHEREFORE, movants ATTORNEY GENERAL FRANK J. KELLEY, and UAW—MICHIGAN CAP, CITY OF DETROIT, and COUNTY OF WAYNE request that:

1. This commission order that a rehearing be granted in Case No. U-3910 for the purpose of receiving in evidence the facts bearing upon the allegations set forth above; that the Commission thereupon amend its rate order of August 18, 1972, so as to reduce the amount of rate increase granted to Edison from $45.2 million to $35.2 million, or such other figure as will accurately represent, as near as may be, the additional charges that may be assessed against Edison's customers for appliance repair services; that said reduction in the August 18, 1972 rate increase be applied entirely to the residential portion of such rate increase, which was in the amount of $23,627,965; that said reduction, constituting an average of $6.15 per residential customer per year, be accomplished by reducing all residential rates by 4.8%, that being the relationship between the $10 million of additional charges and the company's total residential electric revenues in 1971 of $213,724,000, or some other similarly appropriate method determined by this commission; *or*

2. That this commission order and direct the Detroit Edison Company to make no change in its existing appliance repair service, or in the existing rates and charges for such appliance repair service, unless and until approval for such change or changes has been granted by this commission, after notice in the service area to be affected, and the holding of a public hearing.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

(s) Hugh B. Anderson
Hugh B. Anderson
Assistant Attorney General
Law Building
Lansing, Michigan 48913

CITY OF DETROIT

(s) Robert Reese/pb
Robert Reese
Assistant Corporation Counsel
1010 City-County Building
Detroit, Michigan 48226

COUNTY OF WAYNE

Aloysius J. Suchy
Corporation Counsel

(s) David R. Kaplan/pb
David R. Kaplan
Assistant Corporation Counsel
601 City-County Building
Detroit, Michigan 48226

Michigan UAW-CAP

(s) Daniel P. Dozier/pb
Daniel P. Dozier
Assistant General Counsel
Solidarity House
8000 E. Jefferson
Detroit, Michigan 48214

DATED: September 11, 1972

Exhibit C to Affidavit of Jack E. Menig filed March 25, 1974; Being the Order Denying Motion for Rehearing in MPSC Case No. U-3910.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

• • • • •

In the matter of the application of THE DETROIT EDISON COMPANY for authority to amend its rate schedules governing the supply of electric energy.	)))))	Case No. U-3910

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan, on the 2nd day of April, 1973.

PRESENT: Hon. William G. Rosenberg, Chairman
Hon. Lenton G. Sculthorp, Commissioner
Hon. William R. Ralls, Commissioner

ORDER DENYING MOTION FOR REHEARING

On September 11, 1972, a motion was filed by Attorney General Frank J. Kelley, UAW-Michigan-CAP, City of

Detroit and County of Wayne for rehearing of the Commission's rate increase order of August 18, 1972.

The motion was based upon facts alleged to have arisen subsequent to said order, consisting of an anticipated change in The Detroit Edison Company's policy relating to appliance repair service. The alleged shift in policy, placing the costs of the repair service on a "break-even" basis, would, according to movants, result in an increase in rates of approximately $10,000,000.

The motion requested a rehearing for the purpose of receiving in evidence facts concerning the appliance repair service and seeking either a reduction of the rate increase granted in the order of August 18, 1972 or an order directing The Detroit Edison Company not to make any change in said policy until after notice and public hearing.

On December 15, 1972, The Detroit Edison Company filed its application in Case No. U-4257 for authority to amend its rate schedules. The hearings thereon are presently in progress and encompass the subject matter involved in the Motion for Rehearing, as evidenced by the direct testimony of Robert H. Kelley, filed with the Commission on December 15, 1972.

THEREFORE, IT IS ORDERED that the Motion for Rehearing be and the same is hereby denied.

MICHIGAN PUBLIC SERVICE COMMISSION

(s) William G. Rosenberg
Chairman

(s) Lenton G. Sculthorp
Commissioner

(SEAL)

(s) William R. Ralls
Commissioner

By the Commission and pursuant to
its action of April 2, 1973.

(s) Earl B. Klomparens
Its Secretary

Exhibit to Answer to Interrogatory No. 16, Being the Electric Rate Order in MPSC Case No. U-1791 dated November 12, 1964.

Interrogatory No. 15

Yes

Interrogatory No. 16

The option was withdrawn on December 1, 1964 by authority of the Michigan Public Service Commission in its order dated November 12, 1964 in Case No. U-1791, copy attached, a part of a general rate decrease.

(Received 11-12-64 — E. H. Scott)

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

• • • • •

In the matter of the application of THE DETROIT EDISON COMPANY to revise and reduce certain rates in its Schedule of Electric Rates M.P.S.C. No. 4 and to adopt a new Schedule of Electric Rates M.P.S.C. No. 5.	))))))	Case No. U-1791

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan, on the 12th day of November, A. D. 1964.

PRESENT: Hon. Peter B. Spivak, Chairman
Hon. John E. Tormey, Commissioner
Hon. George Washington, Commissioner

ELECTRIC RATE ORDER

Application was filed November 6, 1964, by The Detroit Edison Company requesting approval to revise and reduce certain rates in its Schedule of Electric Rates M.P.S.C. No. 4 and to adopt a new Schedule of Electric Rates M.P.S.C. No. 5.

Applicant represents as follows:

1. That in its endeavors to sell more electric energy, applicant is continually faced with competition from those engaged in the sale of other forms of energy and in the sale of other things competing for the same consumer dollars. The ability to hold and to expand its market, by supplying adequate electric service at reasonable and competitive rates, depends to a large extent on a substantial and continuing growth in the use of electricity by its customers.

2. That since 1948 the wages and salaries paid by the applicant as well as most of its other operating expenses have increased many times, but the applicant, by the application of sound business management methods, nevertheless succeeded in reducing its unit costs of producing electric energy, and has refrained from seeking any increase in its rates.

3. That, in the same period, applicant has reduced its general residence rate, introduced special low rates for water heaters and for all-electric homes, and for promotional purposes has modified its Commercial Rates and Primary Supply Rates.

4. That if it is permitted to make further reasonable reductions in its rates for certain classes of its service, applicant can and will be able to sell more electric energy which will tend to reduce its unit costs of producing the electric energy and thus strengthen its competitive efforts.

5. That the proposed revisions in the rate schedules hereinafter referred to would reduce applicant's revenues by nearly $3,750,000 annually based upon the present use

of electricity, but that the applicant believes the proposed reductions will tend to increase net electric revenues.

6. That the proposed revenue reductions would be apportioned among the various customer classes as follows:

Domestic Service	$1,745,000
All-Electric Domestic	23,000
Water Heater (10 hour)	141,000
General Service	1,355,000
Large General Service	436,000
Standard Primary Supply	32,000
Alternative Primary Supply	17,000
Total	$3,749,000

7. That the inauguration of the proposed revisions and changes in rates will not result in increased bills for any customer.

The Commission having carefully considered the matter before it and being advised in the premises FINDS that The Detroit Edison Company's application of November 6, 1964, requesting authority to reduce certain rates and adopt a new Schedule of Rates M.P.S.C. No. 5 should be approved as follows:

Residence Rate, Schedule Designation D1, be retitled *Domestic Service Rate,* Schedule Designation D1. This rate schedule is to be revised so that the excess step comes after the

use of 500 kilowatthours per month with the rate to be reduced to 1.6¢ (gross) per kilowatthour. A floating block at 1.0¢ (gross) per kilowatthour is to be incorporated for controlled Water Heating Service.

All-Electric Domestic Service Rate, Schedule Designation D1.1, to be refiled as Schedule Designation D1.1 and to be revised so that the excess step is reduced to 1.5¢ (gross) per kilowatthour.

Water Heating Rate (For Service During Valley Hours), Schedule Designation D2, to be withdrawn and all customers taking service thereunder will be transferred to the floating block application on the proposed Domestic Service Rate. Applicant will require a reasonable period of time to contact customers and change time clocks for the 30,329 Domestic customers and the 853 General Service customers taking service under this rate. These customers will continue to be billed on the present rate until such time as the transfer is made.

Water Heating Rate (For Controlled Off-Peak Service), Schedule Designation D2.1, to be refiled under Schedule Designation D2 as an optional water heating service in conjunction with either of the Domestic Service Rates.

General Commercial Rate, Schedule Designation D3, to be retitled *General Service Rate,* Schedule Designation D3. This rate

schedule is to be revised so that the excess step comes after the use of 10,000 kilowatthours per month with the rate to be reduced in all blocks. The fuel clause is to be restated from a fuel charge to a fuel adjustment clause applicable after the use of 600 kilowatthours per month. The Lamp Credit is to be withdrawn, and the net effect of these changes is to be a reduction for all levels of consumption. Lamp replacements of approved burned out incandescent lamps will continue to be furnished under this rate schedule.

Commercial Demand Rate, Schedule Designation D4, to be retitled *Large General Service Rate,* Schedule Designation D4. This rate schedule is to be revised so that the initial step of the Demand Charge for 5.0 kilowatts or any less demand is $20.00 per month with the rate to be reduced in all blocks. The fuel clause is to be restated from a fuel charge to be a fuel adjustment clause applicable to all kilowatthours. The Lamp Credit is to be withdrawn, and the net effect of these changes is to be a reduction for all levels of consumption where the billing demand is 5.0 kilo-

watts or over. Lamp replacements of approved burned out incandescent lamps will no longer be furnished under this rate schedule.

Any customer presently taking service on the Commercial Demand Rate, whose demand is less than 5.0 kilowatts, will be

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U-1791

billed on the new Large General Service Rate with a $2.00 minimum demand charge instead of the $20.00 minimum charge as established in the new rate. The billing demand to the nearest 0.1 kilowatt will be charged at a rate of $4.00 per kilowatt per month up to 5.0 kilowatts. The provisions applicable to this group are being withdrawn for new business.

Customers presently taking service under the provisions of the Reckoned Demand provision of Rule No. 2, Demand Determination, will be allowed to continue this assessed demand provision on the new Large General Service Rate with the $2.00 minimum charge substituted for the stated $20.00 minimum demand charge as stated in the new rate. The assessed demand provision is to be withdrawn for new business.

Standard Primary Supply Rate, Schedule Designation D5, to be refiled under Schedule Designation D5. The fuel clause is to be restated from a fuel charge to a fuel adjustment clause applicable to all kilowatthours. The cost of 12,500 Btu at 27.5¢ per million Btu has been added to the steps of the stated energy charge.

Alternative Primary Supply Rate, Schedule Designation D6, to be refiled Schedule Designation D6. The fuel clause is to be restated from a fuel charge to a fuel adjustment clause

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applicable to all kilowatthours. The cost of 12,500 Btu at

27.5¢ per million Btu has been added to the stated energy charge.

Electric Furnace Rate, Schedule Designation D8, to be refiled under Schedule Designation D8. The fuel clause is to be restated from a fuel charge to a fuel adjustment clause applicable to all kilowatthours. The cost of 12,500 Btu at 27.5¢ per million Btu has been added to the stated energy charge.

Municipal Pumping Rate (At Primary Voltage), Schedule Designation E4, to be refiled under Schedule Designation E4. The fuel clause is to be restated and the cost of 12,500 Btu at 27.5¢ per million has been added to the stated energy charge.

Municipal Pumping Rate (At Secondary Voltage), Schedule Designation E5, to be refiled under Schedule Designation E5. The fuel clause is to be restated and the cost of 15,600 Btu at 27.5¢ per million Btu has been added to the applicable steps of the stated energy charge.

Electric Metal Melting, (Standard Contract Rider No. 1), Schedule Designation R1, to be refiled under Schedule Designation R1. The fuel adjustment clause has been restated and the cost of 12,500 Btu at 27.5¢ per million Btu has been added to the applicable steps of the stated energy charge.

Apartments and Rooming Houses (Standard Contract Rider No. 5) to be filed as a rider modifying the contract for service for those accounts presently operating as apartment houses or rooming

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houses and electing to take advantage of the reckoned demand provision. This application will be frozen until such time as the status of each account is changed. The minimum demand is to be waived and the assessed demand will be billed at $4.00 per kilowatt under 5.0 kilowatts.

Demand Determination, Rule No. 2, Schedule Designation B2. The reckoned demand for apartment houses and rooming houses to be withdrawn for new business. This

application is to be refiled as Standard Contract Rider No. 5 for those customers presently taking such service.

Fuel Adjustment. A new fuel adjustment clause applicable to all rates previously having the adjustment based on the cost of 15,600 Btu, General Service Rate, Large General Service Rate, and Municipal Pumping Rate (at Secondary Voltage) will be as follows:

> The fuel adjustment shall consist of an additional .0012¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0012¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-

> thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plant for such fuel, plus any excise or taxes placed upon the purchase of transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

A fuel adjustment clause applicable to all rates previously having the adjustment based on the cost of 12,500 Btu, Standard Primary Supply Rate, Alternative Primary Supply Rate, Electric Furnace Rate, Municipal Pumping Rate (At Primary Voltage), Electric Metal Melting Rider will be as follows:

> The fuel adjustment shall consist of an additional .0011¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0011¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any

> month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes

> placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that The Detroit Edison Company shall promptly file rate sheets substantially the same as the sheets attached hereto as Exhibit A to be effective on service rendered on and after December 1, 1964, which will be equivalent to billing units scheduled for processing on and after January 4, 1965.

IT IS FURTHER ORDERED that the approval herein given is without prejudice to the power of this Commission at any time on its own motion or on petition of any interested party to inquire into and investigate the rates, charges, practices and services hereby approved.

The Commission specifically reserves jurisdiction of the matters herein contained and the authority to issue such further

order or orders as the facts and circumstances may require.

MICHIGAN PUBLIC SERVICE COMMISSION

(s) Peter B. Spivak
Chairman

Exhibit to Answer to Interrogatory No. 16

(s) John E. Tormey
Commissioner

(s) George Washington
Commissioner

(SEAL)

By the Commission and pursuant
to its action of Nov. 12, 1964.

(s) Norman Berkowitz
Its Secretary

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ss

Exhibit to Answer to Interrogatory No. 16

Exhibit "A"

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service to residences whether located in urban communities or on farms. Service to buildings appurtenant to the residence or farm may be taken through the residence meter.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE, AND VOLTAGE: Alternating current, single phase, nominally at 120-240 volts, three wire.

RATE PER MONTH:

Energy Charge:

5.85¢ per kilowatthour for the first 15 kilowatthours,
3.50¢ per kilowatthour for the next 85 kilowatthours,
2.75¢ per kilowatthour for the next 150 kilowatthours,
2.25¢ per kilowatthour for the next 250 kilowatthours, and
1.60¢ per kilowatthour for the excess.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is limited by a clock or other timing device to 20 hours per day, said hours to be established from time to time by the Company. A rate of 1.0¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	400 kilowatthours
80 gallon tank	550 kilowatthours
110 gallon tank	700 kilowatthours

Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at each step of the rate are twice the monthly quota.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: 75¢ per month less 3% for prompt payment.

(Continued on next page)

Exhibit to Answer to Interrogatory No. 16

DOMESTIC SERVICE RATE - Continued

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residence connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RATES AND RULES:

Rule No. 1 - Choice of Rates
Rule No. 5 - Line Extensions and Service Connections
Rate No. D2 - Water Heating Rate

Exhibit to Answer to Interrogatory No. 16

ALL-ELECTRIC DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available on an optional basis to customers desiring service for all domestic purposes through one meter to a single occupancy in which the space heating and water heating are supplied by electric service installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120-240 volts, three wire.

RATE PER MONTH:

Energy Charge:
$1.50 per month which shall include 15 kilowatthours or less,
3.5¢ per kilowatthour for the next 85 kilowatthours,
2.5¢ per kilowatthour for the next 100 kilowatthours,
2.0¢ per kilowatthour for the next 300 kilowatthours, and
1.5¢ per kilowatthour for the excess.

Controlled Water Heating Service:

Controlled service to the lower element of electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service, is limited by a clock or other timing device to 20 hours per day, said hours to be established from time to time by the Company. A rate of 1.0¢ (gross) per kilowatthour shall apply to the number of kilowatthours listed below, but not to the first 100 kilowatthours per month:

50 gallon tank	400 kilowatthours
80 gallon tank	550 kilowatthours
110 gallon tank	700 kilowatthours

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.50 per month less 3% for prompt payment.

LAMP SUPPLY: Incandescent lamps will be furnished without extra charge:

(1) To residence connected for the first time to the Company's lines, in such quantities as may be needed, but not to exceed 40 lamps to any one residence.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under this rate.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES AND RATES:
Rule No. 1 - Choice of Rates
Rule No. 2 - Line Extensions and Service Connections
Rate No. D2 - Water Heating Rate

Exhibit to Answer to Interrogatory No. 16

WATER HEATING RATE
(FOR CONTROLLED OFF-PEAK SERVICE)

AVAILABILITY OF SERVICE: Customers desiring controlled service to electric water heaters, the design and method of installation of which are approved by the Company as adapted to such service.

HOURS OF SERVICE: The daily use on the lower heating element will be limited by a clock or other timing device to 20 hours per day, the hours to be established from time to time by the Company.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 230 volts two-wire.

Except that, in certain city districts, alternating current service is at 208 volts two-wire.

RATE PER MONTH:

NOMINAL TANK CAPACITY (IN GALLONS)	RATE
50	$4.00
80	$5.50
110	$7.00

Bills are rendered monthly or bi-monthly, as the Company's rule in force at time and place of service may provide. When bills are rendered bi-monthly, the bill shall be twice the stated monthly bill.

DISCOUNT: 3% for prompt payment.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1 - Choice of Rates
Rule No. 5 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the Large General Service Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120 volts, two-wire, or 120-240 volts, three wire: or three phase four-wire, delta connected at 120-240 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three phase four-wire service may be taken.

RATE PER MONTH:
5.15¢ per kilowatthour for the first 100 kilowatthours,
4.15¢ per kilowatthour for the next 500 kilowatthours,
2.65¢ per kilowatthour plus fuel adjustment for the next 4400 kilowatthours,
2.30¢ per kilowatthour plus fuel adjustment for the next 5000 kilowatthours, and
2.05¢ per kilowatthour plus fuel adjustment for the excess.

The fuel adjustment shall consist of an additional .0012¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0012¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $1.00 per month, less 3% discount for prompt payment.

LAMP SUPPLY: Replacements of approved burned out incandescent lamps will be furnished without extra charge.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1 - Choice of Rates
Rule No. 2 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

LARGE GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Persons desiring service for any commercial or industrial purpose, except that this rate cannot be taken in conjunction with the General Service Rate.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 115 volts, two-wire, or 115-230 volts, three-wire; or three phase four-wire, delta connected at 115-230 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120 volt two-wire, 120-208 volt three phase four-wire service may be taken.

RATE PER MONTH:

1st 5 Kw or less	$20.00
Next 195 Kw	3.50/Kw
Excess	2.50/Kw
1st 10,000 Kwhr	1.73¢ + Fuel adjustment
Next 30,000 Kwhr	1.05¢ + Fuel adjustment
Excess	.95¢ + Fuel adjustment

The fuel adjustment shall consist of an additional .0012¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0012¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

DEMAND DETERMINATION: Demand indicators are read monthly at the time of the scheduled meter reading. The normal billing demand is the highest single reading of the demand indicator established during the billing period.

(Continued on next page)

Exhibit to Answer to Interrogatory No. 16

LARGE GENERAL SERVICE RATE - Continued

VALLEY HOUR USE: To the highest single demand in each day, excluding valley hours, shall be added one-third of the amount by which it is exceeded by the highest single demand occurring during valley hours on the same calendar day.

MINIMUM CHARGE: The minimum demand charge shall be $20.00 per month, less 3% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge. See Special Minimum Charges, Sheet No. B6.

CONTRACT TERM: For Demands up to 100 Kilowatts: The agreements are open order, terminable on three days written notice by either party.

For demands in Excess of 100 Kilowatts: As to continuity of service and as to demand charge, but not as to kilowatthour rate; the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1 - Choice of Rates
Rule No. 4 - Resale of Service
Rule No. 5 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

STANDARD PRIMARY SUPPLY RATE

AVAILABILITY OF SERVICE: Persons who desire service in blocks of not less than 100 kilowatts (except where the Company's lines are underground or may be required to be placed underground, where the minimum demand is 200 kilowatts) and who have their own substation equipment and skilled attendants.

The Company does not hold itself out as ready to serve at this rate the applicant whose requirements are in excess of 1,000 kilowatts, whether that capacity be installed in one block or arrived at by accretions. Such large capacities require special arrangements by both Company and customer.

This rate is not available for that portion of a customer's load used to operate electric arc furnaces for metal melting or reduction of metallic ores, where the largest furnace has a nameplate rating of 5,000 kva or more. See Electric Furnace Rate, Schedule Designation D8.

HOURS OF SERVICE: 24 hours, subject to interruption by agreement, provided, however, that an interruption of more that 30 minutes occurring without prior notice to the customer and due to a cause within the control of the Company shall warrant a credit to the customer's gross bill, before the power factor credit, of 10¢ per kilowatt of demand interrupted per hour of interruption, but not to exceed the demand charge for the month of the interruption.

CURRENT, PHASE, AND VOLTAGE: Alternating current, three phase, delta connected, nominally at 4,800 or 24,000 volts at the option of the Company.

RATE: A monthly demand charge of

$300.00 for the first 100 kilowatts of demand or any less demand,
$3.00 per kilowatt of demand for the next 100 kilowatts,
$2.00 per kilowatt of demand for the next 800 kilowatts,
$1.50 per kilowatt of demand for the next 4,000 kilowatts, and
$1.00 per kilowatt of demand for the excess, plus

An energy charge per kilowatthour of

9.45 mills plus fuel adjustment for the first 50,000 kilowatthours,
8.95 mills plus fuel adjustment for the next 950,000 kilowatthours, and
8.45 mills plus fuel adjustment per kilowatthour for the excess.

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Exhibit to Answer to Interrogatory No. 16

STANDARD PRIMARY SUPPLY RATE - Continued

The fuel adjustment shall consist of an additional .0011¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0011¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

DEMAND DETERMINATION: The daily demand is the average of the three highest readings of the demand indicator in each day, or two-thirds of the one highest reading, whichever is higher. The normal billing demand is the highest daily demand established during the billing period.

VALLEY HOUR USE: To the average of the three highest demands occurring in each day, excluding valley hours (or two-thirds of the single highest demand in the same period, whichever is higher), shall be added one-third of the amount by which it is exceeded by the highest single demand occurring during valley hours on the same calendar day.

POWER FACTOR CREDITS: Credits are allowed for Power Factors of .750 and higher in accordance with the following table:

POWER FACTOR	CREDIT ALLOWED
.749 and lower	None
.750 to .799	1%
.800 to .849	2%
.850 to 1.000	3%

No credit greater than 3% will be allowed for leading power factors. The Power Factor credit shall be deducted before applying the prompt payment discount and shall not reduce the prescribed minimum charge.

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Exhibit to Answer to Interrogatory No. 16

STANDARD PRIMARY SUPPLY RATE - Continued

MINIMUM CHARGE: The demand charge as above (except that in underground districts, the minimum demand charge is $600.00 per month) less 3% discount for prompt payment. See Special Minimum Charges, Sheet No. B6.

CONTRACT TERM: As to continuity of service and as to demand charge, but not as to kilowatthour rate: the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ASLO THE FOLLOWING RULES:

Rule No. 1 - Choice of Rates
Rule No. 2 - Schedule of Valley Hours
Rule No. 3 - Power Factor Determination
Rule No. 4 - Resale of Service
Rule No. 5 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

ALTERNATIVE PRIMARY SUPPLY RATE

AVAILABILITY OF SERVICE: Persons who desire service in blocks of not less than 500 kilowatts and who have their own substation equipment and skilled attendants.

The Company does not hold itself out as ready to serve, at this rate, the applicant whose requirements are in excess of 1,000 kilowatts, whether that capacity be installed in one block or arrived at by accretions. Such large capacities require special arrangements by both Company and customer.

This rate is not available for that portion of a customer's load used to operate electric arc furnaces for metal melting or reduction of metallic ores, where the largest furnace has a nameplate rating of 5,000 kva or more. See Electric Furnace Rate, Schedule Designation D8.

HOURS OF SERVICE: 24 hours, subject to interruption by agreement, provided, however, that an interruption of more than 30 minutes occuring without prior notice to the customer and due to a cause within the control of the Company shall warrant a credit to the customer's gross bill, before the power factor credit, of 10¢ per kilowatt of demand interrupted per hour of interruption, but not to exceed the demand charge for the month of the interruption.

CURRENT, PHASE AND VOLTAGE: Alternating current, three phase, delta connected, nominally at 4,800 or 24,000 volts at the option of the Company.

RATE: A monthly demand charge of

$2,000 for the first 500 kilowatts of demand or any less demand,
$3.50 per kilowatt of demand for the next 500 kilowatts,
$3.00 per kilowatt of demand for the next 4,000 kilowatts,
$2.50 per kilowatt of demand for the next 5,000 kilowatts,
$2.00 per kilowatt of demand for the next 10,000 kilowatts, and
$1.50 per kilowatt of demand for the excess, plus

An energy charge per kilowatthour of 5.95 mills plus fuel adjustment.

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Exhibit to Answer to Interrogatory No. 16

ALTERNATIVE PRIMARY SUPPLY RATE - Continued

The fuel adjustment shall consist of an additional .0011¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0011¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

DEMAND DETERMINATION: The daily demand is the average of the three highest readings of the demand indicator in each day, or two-thirds of the one highest reading, whichever is higher. The normal billing demand is the highest daily demand established during the billing period.

VALLEY HOUR USE: To the average of the three highest demands occurring in each day, excluding valley hours (or two-thirds of the single highest demand in the same period, whichever is higher), shall be added one-third of the amount by which it is exceeded by the highest single demand occurring during valley hours on the same calendar day.

POWER FACTOR CREDITS: Credits are allowed for Power Factors of .750 and higher in accordance with the following table:

POWER FACTOR	CREDIT ALLOWED
.749 and lower	None
.750 to .799	1%
.800 to .849	1%
.850 to 1.000	3%

No credit greater than 3% will be allowed for leading power factors. The Power Factor credit shall be deducted before applying the prompt payment discount and shall not reduce the prescribed minimum charge.

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Exhibit to Answer to Interrogatory No. 16

ALTERNATIVE PRIMARY SUPPLY RATE - Continued

MINIMUM CHARGE: The demand charge as above, less 3% discount for prompt payment. See Special Minimum Charges, Sheet No. B6.

CONTRACT TERM: As to continuity of service and as to demand charge, but not as to kilowatthour rate: the term is two years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the first year.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1 - Choice of Rates
Rule No. 2 - Schedule of Valley Hours
Rule No. 3 - Power Factor Determination
Rule No. 4 - Resale of Service
Rule No. 5 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

ELECTRIC FURNACE RATE

AVAILABILITY OF SERVICE: Customers operating electric arc furnaces for metal melting or the reduction of metallic ores will be required to take service at this rate for the furnace load where the largest furnace has a nameplate rating of 5,000 kva or more. Such large capacities require special arrangements by both Company and customer.

HOURS OF SERVICE: 24 hours, subject to interruption by agreement, provided, however, that an interruption of more than 30 minutes occurring without prior notice to the customer and due to a cause within the control of the Company shall warrant a credit to the customer's gross bill of 10¢ per kilovolt-ampere of demand interrupted per hour of interruption, but not to exceed the demand charge for the month of the interruption.

CURRENT, PHASE AND VOLTAGE: Alternating current, three phase, nominally at 24,000 or 40,000 volts at the option of the Company.

RATE: A monthly demand charge of
$2.00 per kva of demand for the first 5,000 kva, and
$1.25 per kva of demand for the excess, plus

An energy charge per kilowatthour of 5.45 mills plus fuel adjustment.

The fuel adjustment shall consist of an additional .0011¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0011¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: This rate is subject to a minimum monthly charge of $1.00 (gross) per month per kilovolt-ampere of reservation then in effect subject to the prescribed discount for prompt payment.

The reservation is established initially by mutual agreement and thereafter by the highest single reading of the demand meter in any month that exceeds the reservation then in effect. The reservation, however established, shall not be decreased for 12 months after the establishment and then only upon request by the customer. At the time of such request, the new reservation shall be established by mutual agreement between the Company and the customer.

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Exhibit to Answer to Interrogatory No. 16

ELECTRIC FURNACE RATE - Continued

MONTHLY BILLING DEMAND: The daily demand is the average of the three highest 15 minute integrated readings of the demand meter in each day, or two-thirds of the one highest 15-minute integrated reading, whichever is higher. The normal billing demand in kilovolt-amperes is the highest daily demand established during the billing period.

VALLEY HOUR USE: To the average of the three highest demands occuring in each day, excluding valley hours (or two-thirds of the single highest demand in the same period, whichever is higher), shall be added one-third of the amount by which it is exceeded by the highest single demand occurring during valley hours on the same calendar day.

CONTRACT TERM: Special terms taking into consideration the facilities to be furnished by the Company in serving the load. As to continuity of service and as to minimum charge, but not as to rate, contracts will be taken for initial periods of not less than three years, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party, which may be given at any time after the end of the second year.

SPECIAL TERMS AND CONDITIONS: Because of special technical and economic difficulties inherent in the operation of electric arc furnaces, the Company guarantees that service to such furnaces shall not be charged at more than the rate stated in Standard Contract Rider No. 1 - Electric Metal Melting, all subject to the monthly minimum charge.

Service to the non-furnace load will be supplied at regular primary rates. Customers must provide separate circuits for the furnace load and non-furnace load so that the Company may install necessary meters.

To integrate the electric supply to such large capacities and to stabilize and control voltage fluctuations the Company will ordinarily furnish and operate such major corrective equipment and will provide switchgear to individual furnace feeds, as may be required for system operation.

Exhibit to Answer to Interrogatory No. 16

MUNICIPAL PUMPING RATE

(At Primary Voltage)

AVAILABILITY OF SERVICE: Municipalities who desire service for pumping and who have their own substation equipment and skilled attendants, and who purchase annually 500,000 kilowatthours or more.

The Company does not hold itself out as ready to serve at this rate the applicant whose requirements are in excess of 1000 kilowatts, whether that capacity be installed in one block or arrived at by accretions. Such large capacities require special arrangements by both Company and customer.

HOURS OF SERVICE: 24 hour, subject to stoppage on nights, Sundays and holidays to permit work on lines.

CURRENT, PHASE AND VOLTAGE: Alternating current, three phase, delta connected, nominally at 4,600 or 23,000 volts, at the option of the Company.

RATE:

1.445¢ plus fuel adjustment per kwhr for the first 10,000 kwhr per month,
1.145¢ plus fuel adjustment per kwhr for the next 10,000 kwhr per month,
1.045¢ plus fuel adjustment per kwhr for the next 30,000 kwhr per month,
.945¢ plus fuel adjustment per kwhr for the next 50,000 kwhr per month, and
.845¢ plus fuel adjustment per kwhr for the excess.

The fuel adjustment shall consist of an additional .0011¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0011¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 2% for prompt payment.

MINIMUM CHARGE: No minimum charge, but failure to purchase at least 500,000 kilowatthours in any one fiscal year shall terminate the contract. See Special Minimum Charges, Sheet No. B6.

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Exhibit to Answer to Interrogatory No. 16

MUNICIPAL PUMPING RATE - Continued

(At Primary Voltage)

CONTRACT TERM: This is a five year agreement (except as terminated by failure to purchase at least 500,000 kilowatthours per year) extending thereafter from month to month until terminated by mutual consent or by twelve months written notice by either party, which may be given at any time after the end of the fourth year.

SEE ALSO THE FOLLOWING RULES:

Rule No. 1 - Choice of Rates
Rule No. 5 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

MUNICIPAL PUMPING RATE

(At Secondary Voltage)

AVAILABILITY OF SERVICE: Municipalities who desire service for pumping.

HOURS OF SERVICE: 24 hour.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase two-wire or three phase delta connected three-wire, at 230 volts.

Except in certain city districts, where alternating current service is single phase two-wire, or three phase Y connected four-wire, at 208 volts and direct current service (of limited availability) is at 240 volts two-wire.

RATE: 3¢ per kwhr for the first 5,000 kwhr per month,
1.60¢ per kwhr for the next 5,000 kwhr per month, and
1.38¢ plus fuel adjustment for the excess.

The fuel adjustment shall consist of an additional .0012¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0012¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

MINIMUM CHARGE: $2.00 per month, less 3% discount for prompt payment.

CONTRACT TERM: This is an open order agreement, terminable on three days written notice by either party.

SEE ALSO THE FOLLOWING RULES:
Rule No. 1 - Choice of Rates
Rule No. 5 - Line Extensions and Service Connections

Exhibit to Answer to Interrogatory No. 16

STANDARD CONTRACT RIDER NO. 1
ELECTRIC METAL MELTING

APPLICABLE TO:

Standard Primary Supply Rate	Schedule Designation D5
Alternative Primary Supply Rate	Schedule Designation D6
Electric Furnace Rate	Schedule Designation D8

Because of special economic and technical difficulties inherent in the operation of electric metal melting furnaces, the Company desires to encourage and assist the development of the art. Consequently for those furnaces operated by customers taking their supply at a primary rate and who provide a special circuit for the furnace so that the Company may install necessary meters, the Company guarantees that service to such furnaces shall not be charged at more than the following rate per month.

RATE: 1.26¢ per kilowatthour for the first 1,000,000 kilowatthours, and 1.145¢ plus fuel adjustment.

The fuel adjustment shall consist of an additional .0011¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0011¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu's. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

SERVICE AT STANDARD AND ALTERNATIVE PRIMARY SUPPLY RATES: The customer will be charged regular primary rates for his total load, or regular primary rates for the non-furnace load plus the above rate (less 3% for prompt payment) for furnace consumption, whichever is less.

This guarantee shall not be applied so as to reduce the minimum charge under the primary contract, as it may be applied to non-furnace load.

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STANDARD CONTRACT RIDER NO. 1
ELECTRIC METAL MELTING-Continued

SERVICE AT ELECTRIC FURNACE RATE: The customer will be charged the applicable rate for the furnace load or the above rate (less 3% for prompt payment), whichever is less.

This guarantee shall not be applied so as to reduce the prescribed minimum charge.

CONTRACT TERM: This rate is made effective by a rider modifying the contract form prescribed for one of the applicable rates.

STANDARD CONTRACT RIDER NO. 5
APARTMENTS AND ROOMING HOUSES

APPLICABLE TO:

Large General Service Rate — Schedule Designation D4

The application of this rider is limited to those customers taking service under these provisions on November 30, 1964. These provisions are withdrawn for new business.

RECKONING OF DEMAND: Apartment houses may elect to be billed at a reckoned demand of 400 watts per apartment in lieu of a metered demand. Every apartment, occupied or vacant, shall be counted in reckoning the demand. Rooming houses may elect to be billed at a reckoned demand of 100 watts per room in lieu of a metered demand. The number of rooms shall be determined as two less than the customary real estate count. For both apartment houses and rooming houses, if the apparent hours of use of the demand reckoned as above exceed 400 hours per month, the demand will be reckoned by dividing the metered kilowatthours by 400 hours. If the demand be reckoned as above, all kilowatthours shall be billed at 1.73¢ per kilowatthour plus fuel adjustment, less the prescribed discount for prompt payment.

RATE PER MONTH:

1st 5 Kw or less	$4.00/Kw
Next 195 Kw	3.50/Kw
Excess	2.50/Kw
All kilowatthours	1.73¢ + Fuel adjustment

The fuel adjustment shall consist of an additional .0012¢ per kilowatthour consumed for each full .1¢ increase in the cost of fuel above 28.0¢ per million Btu's or a reduction of .0012¢ per kilowatthour consumed for each full .1¢ in the cost of fuel below 27.0¢ per million Btu. The price per million Btu during any month shall be the average cost to the Company of 1,000,000 Btu of fuel burned during the preceding month, figured to the nearest one-thousandth of a cent. The cost of fuel shall include the cost of transportation to the Company's generating plants for such fuel, plus any excise or taxes placed upon the purchase or transportation of fuel. Cost of unloading, reloading and storage, switching within or between plants, demurrage and overhead charges, are expressly excluded from this calculation.

DISCOUNT: 3% for prompt payment.

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Exhibit to Answer to Interrogatory No. 16

STANDARD CONTRACT RIDER NO. 5
APARTMENTS AND ROOMING HOUSES -Continued

MINIMUM CHARGE: The minimum demand charge shall be $2.00 per month, less 3% discount for prompt payment. There is no prescribed minimum energy (kwhr) charge.

CONTRACT TERM: The operator of an apartment or rooming house in order to avail himself of the reckoned demand privelege must have provided for it in his agreement for service. In the event an account is closed at a given location, the above provisions are terminated with respect to that location.

Deposition Exhibit No. 2

Deposition Exhibit No. 2, Being the Lamp Test Report from General Electric Company.

Page 1946

Manufacturer ---------- General Electric Company
Test Location ---------- Hale Park
Period or Date of Manufacture ---- September 1971 through February 1972

	25A	60A/3/SE	75A/3/SE	100A/3/SE	150A/3/SE
1. Ordering Abbreviation	90	90	89	90	90
2. Number of Lamps Tested	90	90	89	90	90
3. Average Initial Watts	25.17	59.91	76.29	99.55	149.1
4. Average Watts at 70% Life	23.63	58.25	72.82	97.25	---
5. Rated Initial Lumens	235.0	845.0	1110.0	1620	2700
6. Average Initial Lumens	233.2	828.8	1083.0	1628	2563
7. Average Lumens at 70% Life	186.5	765.1	1003.8	1482	---
8. Rated Life	2500	1350	1350	1350	1350
9. Average Life-Hours	2151	1336	1363	1170	1832

VAB/bag
September 18, 1972

Plf's Depo. Ex. #2 1-10-74-KLE

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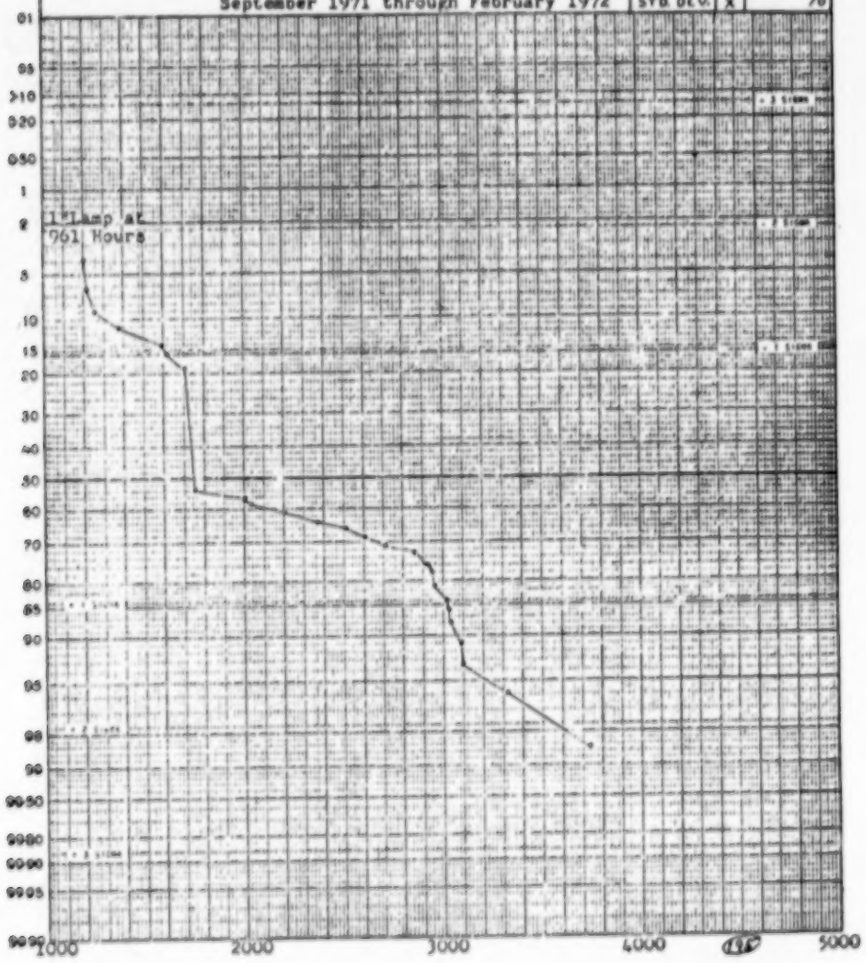
Deposition Exhibit No. 2

PROBABILITY CHART

DATE Sept.14,1972

ARTICLE & SOURCE	25A--Standard Voltage	NUMBER OF UNITS	N	40
CHARACTERISTIC	Life in Hours	AVERAGE	$\bar{X}$	
OTHER IDENTIFICATION	Product Appraisal Report	STANDARD DEVIATION	σ	
	September 1971 through February 1972	PERCENT STD. DEV.	$\frac{\sigma}{\bar{X}}$	%

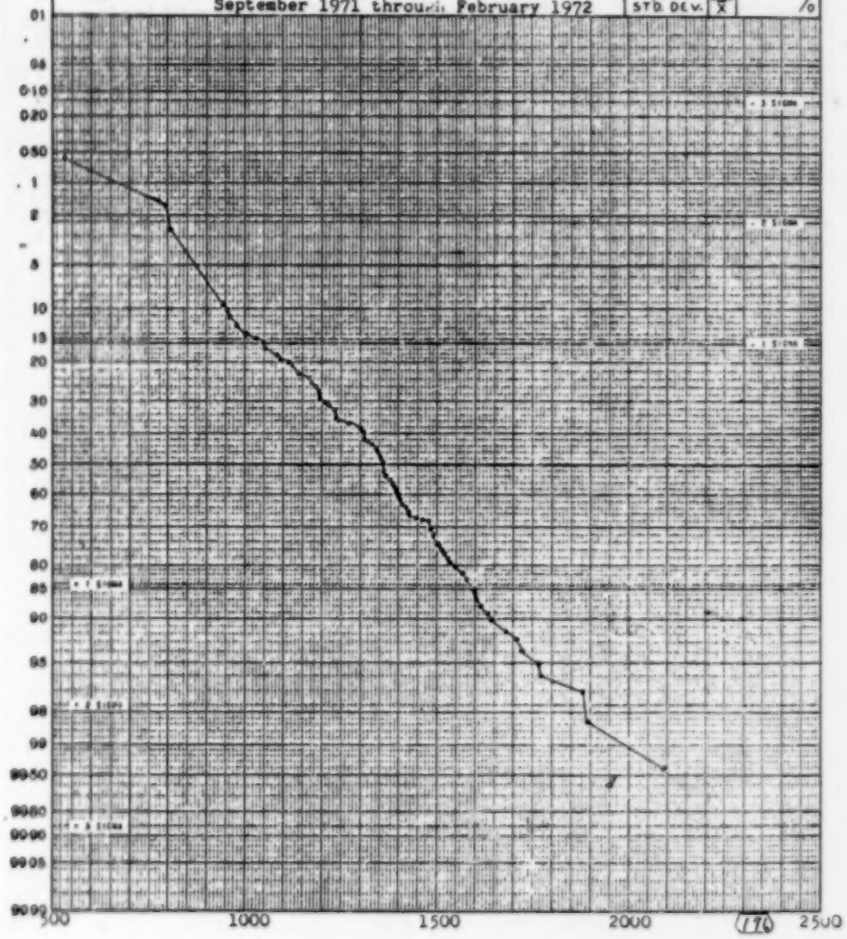


Deposition Exhibit No. 2

PROBABILITY CHART

DATE Sept.14,1972

ARTICLE & SOURCE	60A/3/DE--Standard Voltage	NUMBER OF UNITS	N	90
CHARACTERISTIC	Life in Hours	AVERAGE	$\bar{X}$	
OTHER IDENTIFICATION	Product Appraisal Report	STANDARD DEVIATION	σ	
	September 1971 through February 1972	PERCENT STD. DEV.	$\frac{\sigma}{\bar{X}}$	%

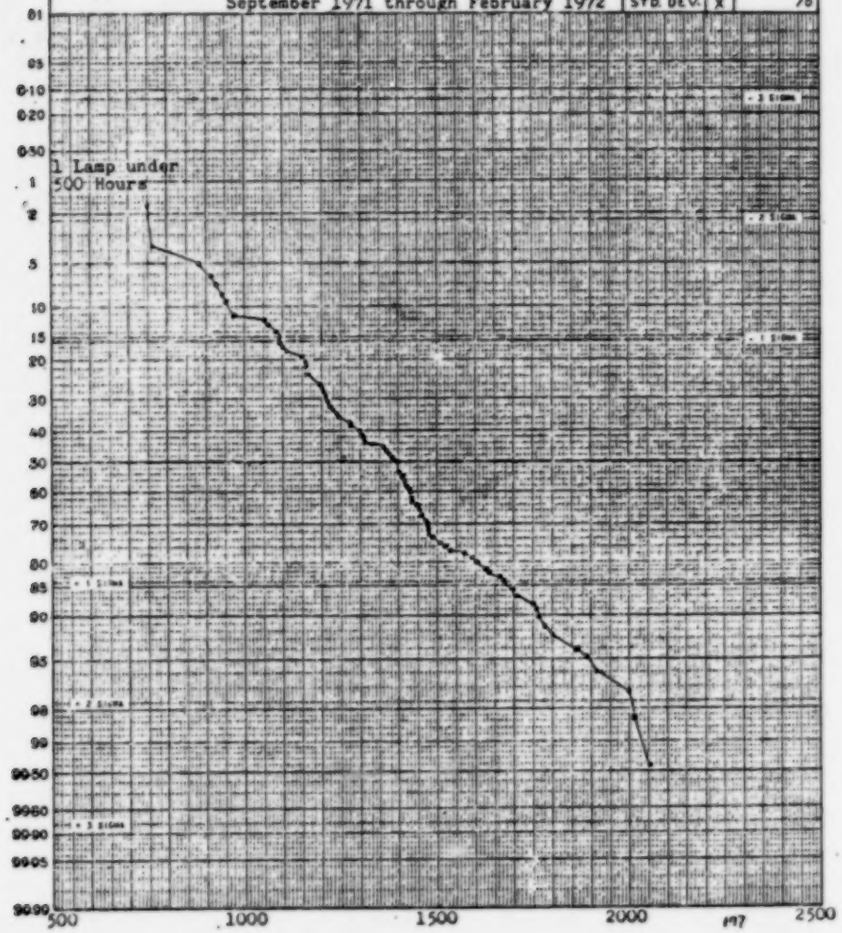


Deposition Exhibit No. 2

PROBABILITY CHART

DATE Sept.14,1972

ARTICLE & SOURCE	75A/3/DE--Standard Voltage	NUMBER OF UNITS	N	89
CHARACTERISTIC	Life in Hours	AVERAGE	$\bar{X}$	
OTHER IDENTIFICATION	Product Appraisal Report	STANDARD DEVIATION	σ	
	September 1971 through February 1972	PERCENT STD DEV.	$\frac{100\sigma}{\bar{X}}$	%

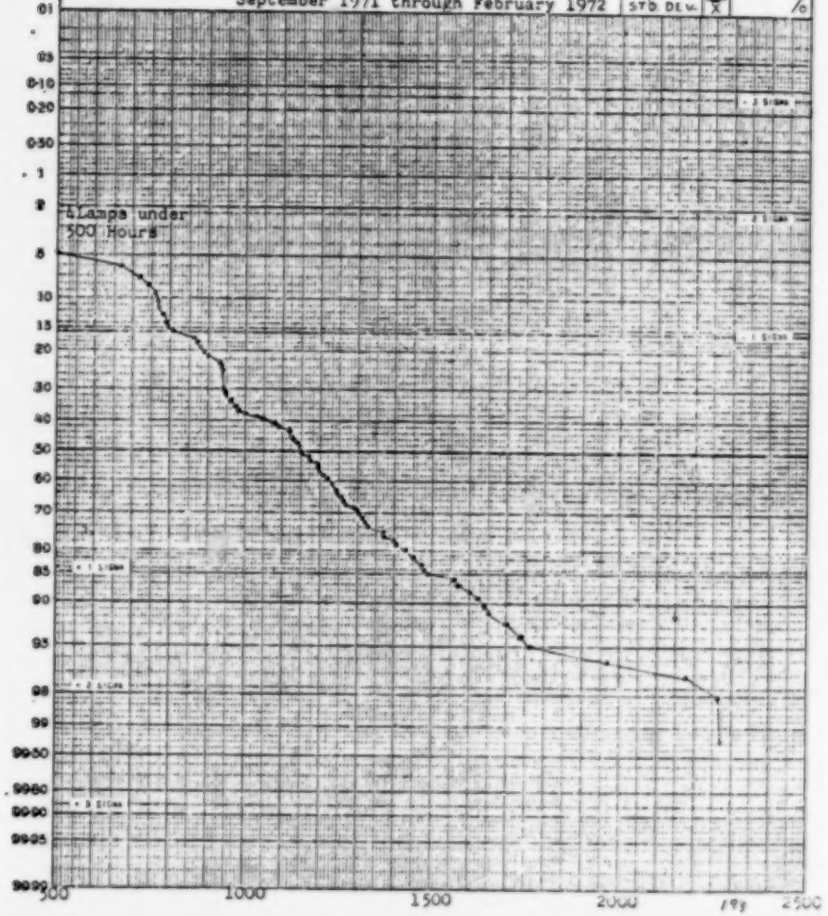


Deposition Exhibit No. 2

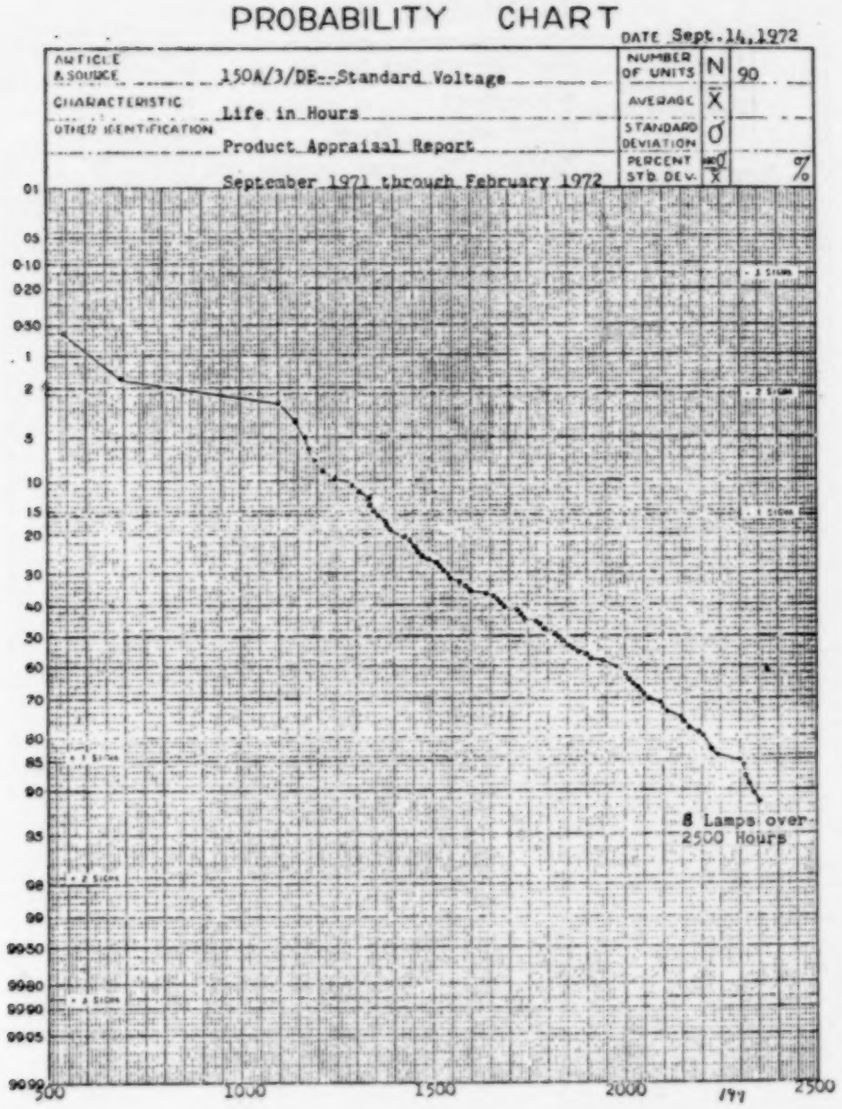
PROBABILITY CHART

DATE Sept.14,1972

ARTICLE & SOURCE	100A/3/DE--Standard Voltage	NUMBER OF UNITS	N	90
CHARACTERISTIC	Life in Hours	AVERAGE	$\bar{X}$	
OTHER IDENTIFICATION	Product Appraisal Report	STANDARD DEVIATION	σ	
	September 1971 through February 1972	PERCENT STD DEV.	$\frac{100\sigma}{\bar{X}}$	%



Deposition Exhibit No. 2



Edison's Purchase Analysis Report, Etc.

Edison's Purchase Analysis Report bearing No. M-300206 dated December 18, 1972, Being Edison's analysis covering purchase of bulbs for the lamp program for 1973.

M-300206

PURCHASE ANALYSIS REPORT

CLASS 80

DESCRIPTION: Lamps - Free Removal

LOCATION OR JOB: All Marketing Offices

USING DEPT.: Marketing

BUYER: D. J. Carrier

TOTAL VALUE: Est. $2,216,830.00

PRICE BASIS: Firm

P.O. NO.: M-300208

DATE: 12/18/72

VENDOR: 1. General Electric Lamp

COVERAGE: 1 year

DATES: 12/71 12/72

LABOR RATE: 3.60 3.85

COMMODITY INDEX: 114.6 120.2

PRICE	QUALITY	PAST SERVICES	PAST APPROVED VENDORS	O.E.M. PERFORMANCE PARTS	ENGINEERING PREFERENCE	DESIGN STANDARD	DELIVERY
X	X	X					

Est. $2,118,335.00

201

The attached quotation work sheets on our 1973 requirements received from General Electric, Sylvania and Westinghouse were reviewed and evaluated by Purchasing and Marketing Management. Price, quality, and service furnished by each supplier were carefully analyzed - see attached rating sheets. General Electric was rated superior, and it was decided to award them a contract for our entire requirement of exchange lamps.

Vendor	Total
General Electric	$2,216,830.00
Westinghouse	$2,118,467.00
Sylvania	$2,416,448.00

PREVIOUS PURCHASES:

General Electric M-200222 12/15/71

also mailed to: Sylvania
Westinghouse

AREA CODE 313
TELEPHONE 962-2100

THE DETROIT EDISON COMPANY
2000 SECOND AVENUE
DETROIT, MICHIGAN 48226

November 16, 1971

General Electric
Lamp Department
15135 Hamilton Avenue
Highland Park, Michigan

Gentlemen:

Please furnish your 1972 proposal for exchange lamps and Company use lamps by December 6, 1971.

Trade discount, cash discount and price protection should be included.

DJC

Donald J. Carrier, Buyer
Materials, Supplies &
Office Equipment

DJC/pay

Date ??

GENERAL ELECTRIC

GENERAL ELECTRIC COMPANY, 15135 HAMILTON AVENUE, DETROIT, MICHIGAN 48203
Phone (313) 883-0200

LAMP SALES
DEPARTMENT
GREAT LAKES SALES REGION

November 6, 1972

The Detroit Edison Co.
2000 Second Avenue
Detroit, Michigan 48226

Attention: Mr. Don Carrier

Gentlemen:

Subject: Detroit Edison Renewal Lamp Requirements 1973

We are pleased to offer the following prices and terms for your 1973 Exchange Lamp requirements:

1. Exchange Lamp requirements at net prices on the attached net price schedule firm for 1973.

2. An additional discount from net prices based on annual purchases in accordance with the following schedule:

Additional Discount Schedule

Calendar Year Purchase	Discount
Up to 600	0
600 to 900	2%
900 to 1,200	3%
1,200 to 1,500	4%
1,500 to 1,800	5%
1,800 to 2,100	6%
2,100 to 2,400	7%
2,400 and up	8%

We have not yet been requested to quote the other areas of your lamp requirements--street lighting, maintenance, etc. However, at the time that these requirements are quoted, we will include the purchases in these areas towards the steps shown. In other words, all lamp purchases (including exchange lamps) will be counted towards the steps shown above to earn additional discounts.

3. Payment terms 2% cash discount, 5th and 20th prox.

4. Continuation of Consignment Agreement presently in place for Exchange Lamps.

Sincerely,

L. Todd Bower

LTB:ccc

1973 Detroit Edison Exchange Lamps

Lamp	Net Price
60A/3/DE	.114
75A/3/DE	.114
100A/3/DE	.114
150A/3/DE	.156
200A/3/DE	.173
300M/3IF/DE	.263
300/IF/DE	.340
500/IF/DE	.474
50/150A/DE	.273
50/250M/W/DE	.323
100A/RS/DE	.191
100/300/DE	.440

* remarketed by G.E.

GENERAL ELECTRIC

GENERAL ELECTRIC COMPANY, 15135 HAMILTON AVENUE, DETROIT, MICHIGAN 48203
Phone (313) 883-0200

LAMP SALES
DEPARTMENT
GREAT LAKES SALES REGION

January 15, 1973

Mr. Harold McDonald
The Detroit Edison Co.
2000 2nd Avenue
Detroit, Michigan 48226

Dear Harold,

Subject: Detroit Edison Exchange Lamps-1973
Reference: Detroit Edison P.O. #M300206

Upon your request to relist the 25A/3/DE lamp to your Exchange list, I wish to enter our quotation:

Lamp	Net Price
25A/3/DE	$.117

This lamp net price is the same as quoted for 1972, and is subject to an additional discount of 10%, as well as other terms stated in our quotation of November 17, 1972.

Yours very truly,

L. Todd Bower

LTB:acc

Westinghouse Electric Corporation Consumer Products

Lamp Division
1560 Stadium Drive
Indianapolis Indiana 46202
(317) 632 3301

CONSUMER LAMP DIVISION

November 3, 1972

Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226

ATTENTION: Mr. D. J. Carrier, Buyer

SUBJECT: Renewal Service Lamp Requirements of 1973

Dear Mr. Carrier:

On behalf of the Westinghouse Lamp Division I express a sincere appreciation for the opportunity to submit this letter of quotation to the Detroit Edison Company regarding the Renewal Service Lamps required for 1973.

This quotation is presented in three parts, with each price structure being determined by the volume awarded to Westinghouse in the event that we are selected as the lamp supplier to the Detroit Edison Company.

The following prices will be in effect throughout the entire year of 1973 and will be billed at net prices as shown: (F.O.B.)

Mr. D. J. Carrier
November 3, 1972

Renewal Service Lamp
Requirements of 1973

LAMP TYPE	WESTINGHOUSE PRODUCT NUMBER	* EST. REQUIREMENTS TWELVE MONTHS 1/2	NET PRICES 0-24%	25-49%	50-100%
60A	327783	6,267,000	.106	.102	.098
75A	327791	5,940,000	.106	.102	.098
100A	327809	6,800,000	.106	.102	.098
150A	327817	2,009,000	.162	.156	.150
50/150A	327825	627,000	.274	.263	.250
50/250A	327833	1,280,000	.319	.306	.297
200A	330423	693,000	.176	.169	.162
100A/RS	257543	153,000	.209	.203	.195
300A	384859	196,000	.260	.250	.240
300	258160	35,000	.340	.327	.312
500IF	354233	14,000	.485	.467	.446

* Please note that the estimated quantities are based on the nine months figure supplied in your letter of October 18, 1972, plus a computed three month figure. It is understood that these quantities are only estimates of actual requirements.

Est quantities used for all NRL prices above are applicable to the lower estimated annual usage

All shipments will be made prepaid to point of delivery with terms of 2% 10th Proximo Net E.O.M.

I trust that the above prices will meet with your approval and serve as a significant factor in maintaining your purchase prices at the lowest possible level.

Although lamp costs are a major factor in the selection of your lamp supplier, I look forward to the opportunity of developing programs beneficial to Detroit Edison and Westinghouse such as performance contests, increased wattage programs, and etc.

My association with the Detroit Edison Company during 1972 has been most beneficial in enabling me to understand your needs and how I can best be of service. Westinghouse has assigned me to the Detroit Edison account and my relocation will permit me to maintain an even closer contact with all principals and District offices.

The entire management team at the Westinghouse Lamp Division shares in my eagerness and sincerity to serve.

If you have any questions regarding this letter of quotation, I can assure you of my assistance in establishing complete clarification.

Very truly yours,

WESTINGHOUSE ELECTRIC CORP.

W. J. Sheehy
SALES REPRESENTATIVE
INDPLS CONSUMER LAMP DIV.

WJS/amg

C.C. Mr. H. McDonald
Supervisor of Materials and Supplies

SYLVANIA

Lighting Products Group
Industrial Commercial Division
18600 Ford Road
Dearborn, Michigan 48126
313 982-9754

November 6, 1972

Mr. Donald J. Carrier, Buyer
Materials, Supplies and Office Equipment
The Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226

Dear Mr. Carrier:

In reference to your letter of October 18, 1972, Sylvania Electric's quotation to The Detroit Edison Company on 1973 requirements for free renewal lamps is outlined on the attached page.

These are net prices to Detroit Edison and are firm for the year 1973. Our delivery and payment terms are as follows:

Delivery Terms: FOB Sylvania Warehouse
Transportation Prepaid

Payment Terms: 2% - 15th first month.

Sincerely,

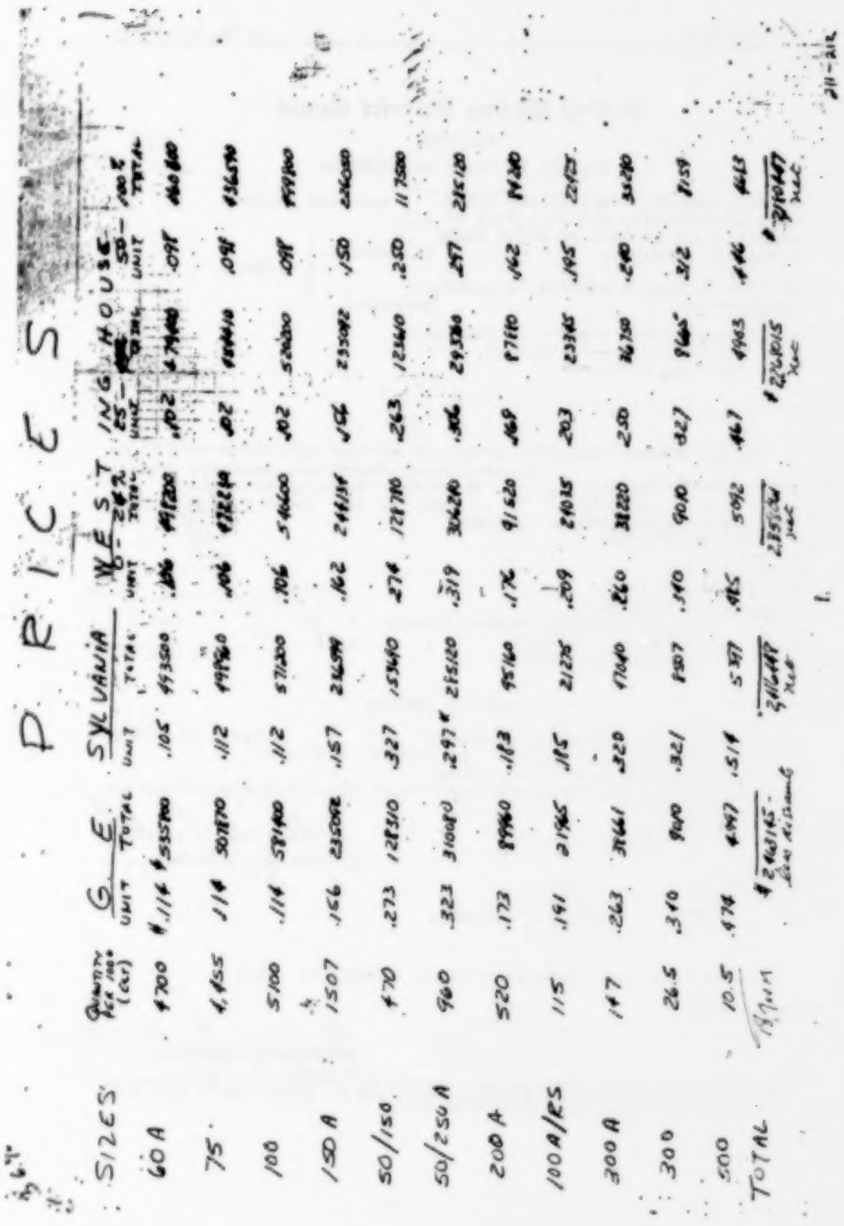
GTE SYLVANIA, INC.

W. E. Davis
District Sales Manager

WED:jb

A part of General Telephone & Electronics

DESCRIPTION	DETROIT EDISON STOCK NBR.	NET PRICE
60A	802-0060	.105
75A	802-0075	.112
100A	802-0100	.112
150A	802-0150	.157
50/250	802-0097	.327
200A	802-0200	.183
100A/RS	802-0012	.185
300M	802-0310	.32
300 Mog.	802-0300	.321
500IF	802-0305	.514



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CIVIL SUBPOENA — D.C. Form No. 1 (Rev. 1-61)

United States District Court

FOR THE

EASTERN DISTRICT OF MICHIGAN

213

LAWRENCE CANTOR, d/b/a SELDON DRUGS CO., Individually and on behalf of all other retail sellers of light bulbs similarly situated, Plaintiffs,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation, Defendant,

CIVIL ACTION FILE NO. 4-70026

To: Kenneth Croy, employe of Michigan Public Service Commission, Lansing, Michigan

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Eastern District of Michigan, Southern Division, at U.S. Courthouse and Federal Bldg. in the city of Detroit, Michigan on the 22nd day of April, 1974, at Two o'clock P. M. to testify on behalf of The Detroit Edison Company in the above entitled action.

April 19, 1974

Christopher C. Nern
Attorney for Defendant Detroit Edison
2000 Second Avenue, Detroit,
Address Michigan 48226

Clerk.

By _____ Deputy Clerk.

RETURN ON SERVICE

Received this subpoena at Detroit, Michigan, on April 19, 1974, and on April 22, 1974, at Detroit, Michigan, I served it on the within named Kenneth Croy by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.

Dated April 22, 1974

By William J. Liedel

Service Fees		
Travel	17.00 $	
Services	20.00	37.00
Total	37.00 $	

Subscribed and sworn to before me, a Notary Public this 22nd day of April, 1974.

MARGARET M. TWOMEY
Notary Public, Wayne County, Mich.
My Commission Expires 9-13-77

Margaret M. Twomey
~~Deputy~~ Spedding
Margaret M. Twomey

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

GPO 938-477

Supreme Court, U. S.
FILED
AUG 20 1975

No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Attorneys for Respondent:

LEON S. COHAN, ESQ.
Vice President & General Counsel
The Detroit Edison Company
2000 Second Avenue-2414 WCB
Detroit, Michigan 48226

-and-

THOMAS P. BINGMAN, JR., ESQ.
The Detroit Edison Company
2000 Second Avenue-688 WCB
Detroit, Michigan 48226

I N D E X

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Gaslight Company of Columbus v Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), cert. denied 404 U.S. 1062 (1972)	5

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Hecht v Pro-Football, Inc., 444 F. 2d 931 (D.C. Cir. 1971), cert. denied 404 U.S. 1047 (1972). . . . 5,9

Howard v State Dept. of Highways of Colorado, 478 F.2d 581 (10th Cir. 1973) 5

Ladue Local Lines, Inc. v Bi-State Dev. Agency of Mo.-Ill. Met. Dist., 433 F.2d 131 (8th Cir. 1970) . . . 5

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Washington Gaslight Company v Virginia Electric Power Co., 438 F.2d 248 (4th Cir. 1970) . . . 6

STATUTES:

Act of Congress Oct. 15, 1914, Clayton Act c. 323, 38 Part I Stat. 730
Sec. 3 (15 U.S.C. Sec. 14)

Act of Congress July 2, 1890, Sherman Act c. 647
(26 Stat. 209)
Sec. 2 (15 U.S.C. Sec. 2)

IV Michigan Compiled Laws, Chap. 460, Sec. 4 (1970)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Eastern District of Michigan is reported at 392 F.Supp. 1110. The Order of the United States Court of Appeals for the Sixth Circuit which is not reported appears in Appendix B to the Petition at 7a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the affirmative action of the Michigan Public Service Commission in not only approving, but indeed requiring, Respondent to adopt a schedule of rates and services which includes the mandate that Respondent provide replacement light bulbs to its rate payers constitutes "state action" under the doctrine of Parker v Brown, thus exempting Respondent's light bulb service from antitrust attack?

STATUTE INVOLVED

The statutory provision involved is Section 460.6 of the Michigan Compiled Laws (official citation), which appears in Appendix C to the Petition at 10a.

STATEMENT OF THE CASE

This case involves the practice of the Respondent electric utility, The Detroit Edison Company, of providing replacement light bulbs in exchange for burned out bulbs in accordance with the Rules, Regulations and Rates for Service affirmatively mandated by the Michigan Public Service Commission. Such schedules cover an array

of services only one of which is lamp exchange. All services must be provided unless and until the Michigan Public Service Commission orders otherwise. Adherence to such schedules and obedience to other orders of the Commission are enforceable by the Commission. As may be seen by reference to the organic statute of the Michigan Public Service Commission (Mich. Comp. Laws §460.6, set forth in Appendix C to the Petition at 10a), the Commission's scope of authority is broad. The Commission is statutorily authorized to determine what services are to be rendered to various categories of customers as well as the rates applicable thereto.

Petitioner, Lawrence Cantor, operates a retail drug store and markets, among other things, light bulbs. He brought suit alleging violation of §2 of the Sherman Act (15 USCA §2 [1970]) and §3 of the Clayton Act (15 USCA §14 [1970]) with respect to the above practice.

The case was submitted to the District Court upon Respondent's Motion for Summary Judgment. Stipulation was made that the case be limited solely to the applicability of the state action exemption doctrine of Parker v Brown, 317 U.S. 341 (1943). Therefore, it is not "uncontradicted" that Respondent "ties the sale of light bulbs to the sale of electricity."* The merits

*On the contrary, Respondent's answer filed herein denies all substantive elements of the Complaint.

of the allegations of antitrust violations were not addressed in the Motion as limited by stipulation and thus have never been reached.

Lamp exchange service was begun in 1886 by Respondent's predecessor, the Edison Illuminating Company of Detroit, and has been embodied in regulated schedules of rates and rules of service since the first rate schedule ordered into effect by a Michigan regulatory agency in 1916. The lamp exchange service rule did not, and does not, require any customer to buy light bulbs; it does require Respondent to provide the service. The Rules, Regulations and Rates for Service setting forth lamp service have been, and are, affirmatively approved and made mandatory by the Michigan Public Service Commission.

The District Court found that Respondent had furnished the Michigan Public Service Commission with the necessary information regarding lamp exchange service from which the Commission derived a comprehensive schedule of rates and services. (See, Petition, Appendix A at 3a). Finding this to be affirmative state action, and therefore within the doctrine of Parker v Brown, supra, the District Court granted summary judgment. The U. S. Court of Appeals for the Sixth Circuit affirmed, adopting the opinion of the District Court.

ARGUMENT

I. THE DECISION HEREIN DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Failing to perceive the difference between decisional conflict and factual distinction, the Petitioner attempts to show conflict among the Circuits. Consistency is acknowledged among the First, Fifth and Ninth Circuits. The Fourth and Sixth Circuits are alleged to be wayward in consequence of an imaginary "tariff sheet theory" to which Petitioner claims they subscribe. In fact, the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits* are all in decisional harmony with each other. They cross-quote each other; they are in accord

*See, e.g., George R. Whitten, Jr., Inc. v Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1969) cert. denied 400 U.S. 850 (1970); Norman's on the Waterfront, Inc. v Wheatley, 444 F.2d 1011 (3rd Cir. 1971); Business Aides, Inc. v Chesapeake & Potomac Telephone Company of Virginia, 480 F.2d 754 (4th Cir. 1973); Gaslight Company of Columbus v Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971) cert. denied 404 U.S. 1062 (1972); Bale v Glasgow Tobacco Bd. of Trade, 339 F.2d 281 (6th Cir. 1964); Ladue Local Lines, Inc. v Bi-State Dev. Agency of Mo.-Ill. Met. Dist., 433 F.2d 131 (8th Cir. 1970); State of New Mexico v American Petrofina, 501 F.2d 363 (9th Cir. 1974); Howard v State Dept. of Highways of Colorado, 478 F.2d 581 (10th Cir. 1973); Hecht v Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) cert. denied 404 U.S. 1047 (1972).

in both principle and decision. The factual settings of these cases differ, but this factor alone accounts for any diferences in results.

The Sixth Circuit's "alignment" with the Fourth Circuit might subject the former to the very criticisms asserted against the latter if the Fourth Circuit opinions in Business Aides, Inc. v Chesapeake & Potomac Telephone Company of Virginia, 480 F. 2d 754 (4th Cir. 1973), and Washington Gaslight Company v Virginia Electric Power Co., 438 F.2d 248 (4th Cir. 1970) said what the Petitioner indicates.

Business Aides, supra, does not stand for the "tariff sheet theory" characterized by Petitioner. Though Business Aides gave recognition to the significance of adherence to the rules and regulations of an operative tariff, such recognition was not without qualification. The Court clearly adopted the universally accepted proposition that reference to an operative tariff is meaningful only where such "rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority. . . ." 480 F.2d 754, 756, 757.

Washington Gaslight, supra, is similarly oversimplified by Petitioner. The Fourth Circuit gave proper recognition to the fundamentals of the Parker doctrine and concluded that because the "practices were at all times within the ambit of regulation and under the control of [the

state agency]", they were exempt from the application of the antitrust laws. However, the Court went on to find that there was no antitrust violation. Therefore, it is impossible to say that the case was decided on the basis of the Parker doctrine rather than on the merits.

Lamb Enterprises, Inc. v Toledo Blade Company, 461 F.2d 506 (6th Cir. 1972) is no aid to evaluation of the Sixth Circuit's position on Parker v Brown, supra. The state action exemption doctrine received no mention and adherence to operative tariffs was mentioned only in passing, for the case was decided on the merits.

II. THE DECISION HEREIN DOES NOT CONFLICT WITH OPINIONS OF THIS COURT

Petitioner's suggestion of a conflict between the opinion below and those in Parker v Brown, 317 U. S. 341 (1943) and Goldfarb v Virginia State Bar, 95 S.Ct. 2004 (1975) is inaccurate. Proper examination reveals no real conflict, merely distinctions based upon evidentiary differences.

The Goldfarb case was lacking one of the essential elements of a Parker doctrine exemption. Neither the Virginia legislature nor the Virginia Supreme Court had authorized or even approved the price fixing fee schedules. In fact such effect had been expressly disclaimed. Furthermore, the fee schedules involved were neither developed, approved, nor affirmatively imposed by the Virginia Court. There was no "state action" involved in the case.

The Virginia State Bar could not have brought itself within the Parker doctrine definition of state action for another important reason unnoted in the opinion. The Virginia State Bar, composed entirely of those to be regulated, could hardly be said to be an agency with the sort of independence stressed in Washington Gaslight Company v Virginia Electric Power Company, 438 F.2d 248 (4th Cir. 1971), and Asheville Tobacco Board of Trade, Inc. v FTC, 263 F.2d 502 (4th Cir. 1959). Therefore, some serious question remains of whether the Virginia State Bar was even a state agency with respect to the challenged conduct.

Petitioner asserts that the instant case aligns the Sixth Circuit with the Fourth Circuit holding in Business Aides, supra. It is then suggested that the Fourth Circuit is in conflict with the opinions of this Court. The syllogism is completed by the conclusion that the instant case therefore must conflict with opinions of this Court. The flaw in this reasoning lies in the characterization of Business Aides, supra. Neither Business Aides, supra, much maligned by Petitioner, nor the instant case (nor any other case to counsel's knowledge) has adopted a pure "tariff sheet theory" as alleged by Petitioner.

The language quoted from Business Aides was immediately followed by an explanation that the "tariff structure theory" has validity only when such "rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority. . " 480 F.2d 754, 756 (4th Cir. 1973). Such explanation precedes the reference to Business Aides in the District Court opinion herein. (See, Appendix A to the Petition at 3a).

Petitioner's reliance upon Gordon v New York Stock Exchange, Inc., 43 U.S.L.W. 4598 (U.S., June 26, 1975), is altogether misplaced as Gordon did not involve the federalism concept fundamental to the state action exemption doctrine of Parker v Brown, supra. Gordon may be added to the list of cases such as Hecht v Pro-Football, Inc., 444 F.2d 931 (D.C. Cir 1971), cert. den. 404 U.S. 1047 (1972), and Ottertail Power

Co. v United States, 410 U.S. 366 (1973) which, though discussing Parker v Brown, supra, are not governed by its principles. Merely the reference to Gordon is indicative of Petitioner's confusion between the implied repealer concept addressed in cases such as Ottertail Power, supra, and the constitutional concept of federalism underlying Parker v Brown, supra.

Gratuitous discourse on the parameters of the Parker state action exemption doctrine abound. Many Courts have undertaken analysis of the Parker doctrine in circumstances totally devoid of considerations of federalism fundamental to Parker. Because such cases do not involve state action which conflicts with the federal antitrust laws, their analyses of Parker are at best dicta. Not surprisingly, the genuine Parker doctrine cases do not refer to these non-Parker analyses.

III. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioner intimates that the Parker doctrine, left unclarified, will result in wholesale circumvention of the federal antitrust laws. His real objection stems from language in the District Court's opinion herein:

> "Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition." (Appendix A to the Petition at 4a, 5a).

Yet, such objection is clearly addressed to the wisdom, rather than the fact, of state action.

By the very essence of Parker the criterion must be affirmative state action. It is not for the federal courts to engage in second-guessing in evaluation of specific state action. The wisdom of a state's action is beyond inquiry. Were it otherwise, the constitutional principle of federalism fundamental to our government would be in grave jeopardy.

Petitioner does not suggest the underlying constitutional concept of federalism fundamental to Parker v Brown be altered. He merely quibbles with its application in the instant case. Furthermore, in so doing he centers on a "tariff sheet theory" which, though troublesome to him, does not in fact

exist and is therefore no real threat to the administration of the federal antitrust laws.

Petitioner hints at procedural importance in his second question presented. It need only be said that the law of summary judgment is well established and not in controversy. The standards for summary judgment were not, nor should they have been applied any differently in this case than in any other. Both courts below, following such settled law of summary judgment, found no genuine issue of material fact and entitlement to judgment as a matter of law. Accordingly, judgment for Respondent was properly entered and affirmed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court, U. S.
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No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a New York corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a New York corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the district court is reported at 392 F.Supp. 1110 (E.D. Mich. 1974). The action of the Court of Appeals is reported at 513 F. 2nd 630 (6th Cir. 1975). Both decisions are included in the Appendix at (56a) and (62a) respectively.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1975 (62a). The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1) providing for jurisdiction on writ of certiorari granted to persons appealing from the decision of a United States Court of Appeal. The petition was granted on October 6, 1975.

QUESTION PRESENTED

Should antitrust immunity under the State action exemption be granted to a private business activity because it is referred to in a rate schedule when there is no legislative imperative nor evidence that a regulatory agency considered the practice?

STATUTES INVOLVED

Act of Congress July 2, 1890, Sherman Act c. 647 (26 Stat. 209) Sec. 1, 2 (15 U.S.C. Sec. 1, 2)

Act of Congress Oct. 15, 1914, Clayton Act c. 323, Sec. 4 Part I Stat. 730, Sec. 4 (15 U.S.C. Sec. 14)

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STATEMENT OF THE CASE

A. *Proceeding below.*

Lawrence Cantor, owner of a retail drug store in Detroit, Michigan, filed this antitrust action on July 6, 1973, seeking treble damages and appropriate injunctive relief in the Eastern District of Michigan, Southern Division (2a). Jurisdiction was based upon 28 U.S.C. Sec. 1337, which confers original jurisdiction on the federal district courts with respect to federal civil actions arising under an Act of Congress protecting trade and commerce against restraints and monopolies. Cantor alleges that all retailers of light bulbs have been damaged by Detroit Edison's

(hereinafter Edison) illegally tying the purchase of light bulbs to the purchase of electrical energy by residential customers, and the consequent total monopolization of the retail light bulb market in the area serviced by Edison. This tying arrangement is alleged to constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, an attempt to monopolize and monopolization under Section 2 of the Sherman Act, 15 U.S.C. Sec. 2, and an illegal exclusive dealing arrangement under Section 3 of the Clayton Act, 15 U.S.C. Sec. 14. Edison filed its Answer (21a) and Motion for Summary Judgment (24a). The motion claimed (1) that Edison's light bulb distribution program was exempt from the federal antitrust laws under the state action doctrine announced by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), because there is a reference to the light bulb program in Edison's rate schedule[1] for electricity approved by the Michigan Public Service Commission (hereinafter the MPSC) and (2) that the program did not violate the antitrust laws. On January 11, 1974, the parties entered into a stipulation severing the issues to permit the District Court to determine the validity of Edison's state action exemption claim (48a). The Honorable Judge John Feikens granted Edison's motion for summary judgment in a memorandum opinion dated

[1] The word "tariff" used in Cantor's Petition for a Writ of Certiorari refers to the "Schedule of Rates Governing the Sale of Electric Service" attached to Plaintiff's Complaint as exhibits. It is the apparent approval of this document and its antecedents that Edison argues is the act of the sovereign which exempts its light bulb program from the antitrust laws. This brief will refer to Edison's 1972 "Schedule of Rates Governing the Sale of Electric Service" and its antecedents as rate schedules.

July 2, 1974 (56a) and issued his order on August 21, 1974 (60a). The Circuit Court of Appeals for the Sixth Circuit on April 23, 1975 affirmed Judge Feikens by adopting his opinion in an abbreviated memorandum (62a).

B. *Statement of Facts*

1. *The Program and its purpose.* Edison's light bulb program entitles a residential customer to one light bulb for every permanent light fixture at the time that the customer's residence is first connected to its lines and thereafter to replacements for "approved" burned-out light bulbs. (214a). The most commonly used sizes are available in the program. (30a). A charge for light bulbs is included in the residential electric service rate and is paid by residential customers whether or not they utilize Edison's light bulb program. (26a, 103a, 111a). Edison distributes light bulbs through Company owned service centers and approximately fifty private agents it employs in its market territory. (192a).

The program began in 1886, when the Detroit Illuminating Co., the predecessor of Detroit Edison began to distribute light bulbs to its customers (26a) and it has continued without interruption until the present day. According to affidavits submitted in support of Edison's Motion for Summary Judgment, the original purpose of the program was "the encouragement of the use of incandescent lamps so as to ultimately encourage the use of electricity in the homes, offices and businesses of Detroit Edison customers" (26a, 29a).

Further, the distribution program appears to have its origins in Edison's desire to compete against gas illuminating companies. (29a) The purpose today remains substantially the same, to "keep the sockets full" (163a) and, according to an independent survey, provide Edison with revenues "considerably above average," and raise wattage on lamps used. (292a)

2. *The regulatory scheme.* Under the Constitution of the State of Michigan since 1908, Edison's right to produce, transmit and sell electricity is derived from each municipality in which it operates, not from the State of Michigan. These rights are contained in long-term contracts between Edison and the various municipalities called "franchises". (53a). The franchises do not provide for the light bulb program (164a) Edison has received no certificate of convenience or necessity or similar right from the State of Michigan. (3a para. 2 compare with 21a para. 2, 52a-53a)

The first interest of the state in electric utilities began in 1909, when the Michigan legislature adopted the Transmission of Electricity Act (MCLA 460.551, et seq.)[2] and assigned to the Michigan Railroad Commission the authority for ". . . control and supervision of the business of transmitting and supplying electricity. . ." (MCLA 460.552) and setting ". . . the rate of charge to be made for the electricity so transmitted. . .", (MCLA 460.-551). The law provides that the municipalities retain control of their streets and highways (MCLA 460.553) and that the Commission can not override rates established by

[2] All citations to Michigan statutes are cited to Michigan Compiled Laws Annotated and designated as MCLA herein. The particular Chapter involved is Chapter 460, which deals with public utilities. Relevant sections are fully set out in the Statutory Appendix.

municipal franchises (MCLA 460.557). In 1919, the Michigan Railway Commission was abolished and its functions transferred to the newly created Michigan Public Utilities Commission (MCLA 460.551 et seq.). In 1939, the MPSC was created and had transferred intact to it the powers and authorities of the Michigan Public Utilities Commission (MCLA 460.1, 460.4).

The business of distributing light bulbs is not referred to in the Constitution or the regulatory scheme of the state of Michigan. However, a reference to the light bulb program has been included in all of the rate schedules which Edison has since 1916, submitted to the MPSC or its predecessors from time to time. See examples at (214a, 260a, 264a, 269a) The description of the program in the rate schedules over the years has not varied substantially. Following is the verbiage used in more recent years to describe the light bulb program:

> "B-5.5 Lamp Supply: incandescent lamps will be furnished without extra charge:
>
> (1) To residence connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
>
> (2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under the applicable rate." (214a).

3. *The lack of regulatory inquiry.* The MPSC has a duty "to make full investigations" on matters of rates and regulations, MCLA 460.54. Despite the MPSC's statutory duty, Edison has produced no evidence of a regulatory hearing or investigation of its bulb program. In particular, Edison has no records of any testimony or other evidence being presented

to the MPSC or its predecessors with respect to the bulb program. (50a-52a, 110a-115a, 126a, 128a, 132a, 145a-146a, 149a, 156a-160a, 164a).

Edison has never submitted to the Commission or its predecessors, nor have these agencies ever requested submission of evidence concerning the types, number, or cost of light bulbs utilized in the program compared to those on the open market. (157a).

No evidence exists which indicates that any Michigan regulatory agency has considered the effect of the bulb program on competition. (157a).

No regulatory proceedings have been held to determine lumens, hour life, wattage, safety, or other bulb specifications, even though Edison's bulbs, which are made to its specifications, provide less light for the electricity used than commercially available bulbs. (324a, compare 325a, 33a, 112a, 113a, 157a-158a).

Edison in the past has tested, and today requires its vendors to test bulbs as to lumens, wattage, and hour life. These test results have not been filed with, requested by, or reported to the MPSC or its predecessors. (85a-86a, 156a).

No proceedings have been held to determine the bulb quantities that should be made available to each residential customer. (112a).

Although the rate schedule refers to "approved" bulbs, there have been no regulatory proceedings in which the selection of any bulb was approved or disapproved by the MPSC. (159a-164a). For example, changes in wattage of the light bulbs furnished from 40 to 50, and later from 50 to 60—have been made without the approval or even knowledge of the MPSC. (160a).

The method of physically distributing light bulbs has never been considered by a regulatory body, even though Edison ceased home delivery in 1954 (29a, 164a). No consideration has ever been given to the method of selecting agents or to the physical location or accessibility of bulb offices or of its agents. (114a).

No hearings have been held or inquiries made to develop regulations, procedures, or rules for the program, and Edison's own extensive rules concerning the operation of the bulb program (196a) have never been considered in regulatory hearings. (146a-147a, 164a, 50a-52a).

No regulatory proceedings have been held to determine the type of light bulbs that are available, e.g., incandescent, fluorescent, etc. (109a-111a).

No hearings have been held concerning Edison's advertising of the bulb program. (114a-115a, 145a-147a). And so, Edison has without restraint in brochures and placards described the program as free or as an exchange.[3] (270a-275a)

---

[3] The program is neither free nor an exchange. The earliest available advertising material uses these misleading terms. (270a-275a). Since approximately 1967 Edison has inaccurately described the program similarly in a welcoming letter to new customers. (272a). All of Edison's light bulb distribution centers—the places where Edison's customers obtain bulbs—display placards describing the program as "free" or as an "exchange". (275a). In fact, Edison purchases the bulbs expressly for resale and presumably escapes paying Michigan sales taxes as a result. See the purchase orders to manufacturers wherein Edison describes the bulbs as purchased for resale. (275a). Edison Executive Vice President for Marketing George Lahodny stated that bulbs received in exchange are destroyed, that no value is assigned to them by Edison (143a) and that the program is financed by revenue derived from rates. (145a).

Edison conducted extensive surveys in 1955, and again in 1970, which included its customers' usage and non-usage of the lamp program. These survey results were apparently not requested by, filed with, nor reported to the MPSC. (161a).

During oral argument in the District Court on Edison's motion for summary judgment, Judge Feikens acknowledged there had been no review of the program after a discussion between both sides and the court. The judge inquired if there had been any regulation or inquiry into the program and Edison counsel admitted:

> "*Mr. Cohen*: Only to a limited extent in 1964. I believe we wished to make some change in our tariff insofar as commercial users were concerned. In other words, to cut commercial users out of the tariff and to that extent there was a kind of limited state activity which determined whether or not we are entitled to do that, or whether or not we shouldn't be allowed to do that." (161a).

Responding, Mr. Sklar (one of Cantor's counsel):

> "I would contend that the Michigan Public Service Commission had not exercised considered judgment and did nothing, and at least there is no evidence on the record today that the Michigan Public Service Commission did anything." (179a).

The Court concluded the discussion by saying:

> "*The Court*: Well, that is true, there is nothing here yet, but Mr. Cohen suggests that he wants to supplement what he has in his paper with some testimony here. . . ." (179a).

Edison, to date, has produced no additional evidence since this characterization of the record by the trial court.

C. The Decisions Below.

1. The Opinion of the District Court.

Judge Feikens' order granting Edison's Motion for Summary Judgment occurred prior to the Supreme Court's decision in *Goldfarb* v. *Virginia State Bar Association, et al.*, Slip. Op. 74-70, —— U.S.——, 95 S.Ct. 2004 (Decided 6/16/75) and rests upon an incorrect view of this Court's holding in *Parker* v. *Brown*. In granting Edison's motion, Judge Feikens stated that the affirmative action of the MPSC in approving Edison's rate structure, which included reference to the light bulb program, and the Commission's continuing supervisory power over Edison, "put this case squarely within the *Parker* doctrine" (59a). As the determinative principle of law, Judge Feikens held: "If (Edison's) action were occasioned by adherence to the rules and regulations of its operative tariffs then it is shielded from liability for any possible antitrust violation". (58a).

The holding appears to stand for the proposition that rate schedules approved by regulatory agencies give antitrust immunity to covered practices without regard for the depth of consideration or for the subject matter of the activity under attack.

Judge Feikens noted that Edison's rate schedules were derived after Edison ". . . furnished the Commission with data including information on the free light bulb exchange program. . . ." (59a) The only data to which Judge Feikens could be referring is a two line entry of bulb costs supplied in pencilled work sheets which Edison made available to MPSC auditors in 1972 which Edison's rate n aking officer admitted were part of voluminous documents, (125a-131a, 320a). Judge Feikens further

declared that "Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition." (60a).

2. The Opinion of the Court of Appeals.

Since the Court of Appeals adopted Judge Feikens opinion, no further comment is necessary.

SUMMARY OF ARGUMENT

There are a multiplicity of reasons why the sovereignty of the State of Michigan is not involved in creating and maintaining Edison's light bulb program. Reversing the district court and the Court of Appeals here for any one of the reasons suggested will not impose upon the sovereignty of the State of Michigan or the principles of dual sovereignty within our federal system.

The antitrust laws, and in particular, the Sherman Act, are the Magna Carta of economic legislation in the United States and are as important to economic freedom as the Bill of Rights is to the protection of our fundamental personal freedoms. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). Immunity from the antitrust laws is sparingly granted and no exception is made for public utilities. *Otter Tail Power Company* v. *U.S.*, 410 U.S. 366 (1973). One exception permits State governments acting in their sovereign capacity through their officers or agents to engage in certain activities, even if anticompetitive, in order to promote the legitimate interests of the State. Thus, the Supreme Court permitted an antitrust exemption to the State of California where the State, by statute, established and participated in a crop limitation, price restriction and crop marketing program,

Parker v. *Brown*, 317 U.S. 341 (1943), and to a program of the State of Texas, which established elaborate controls over the business of pilotage and which made harbor pilots agents of the State, *Olsen* v. *Smith*, 195 U.S. 332, 340 (1904). The Court has denied exemptions to conduct which is essentially private in nature even though it may be authorized by the State, *Northern Securities Company* v. *United States*, 193 U.S. 197 (1904), prompted by a public agency, *Goldfarb* v. *Virginia State Bar Association, et al.*, Slip. op. No. 74-70 decided June 16, 1975, —— U.S. ——, 95 S. Ct. 2004, or even when commanded by State legislation, *Schwegmann Brothers et al.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

Perhaps there may be some private business activities which for fundamental public policy reasons are entitled to antitrust exemptions when commanded by the State. Edison's light bulb program, a purely private business activity whose chief purpose has been to increase use of electricity, is not such an activity.

The brief reference in Edison's rate schedule to the light bulb program, even if the rate schedule has been approved pursuant to order of the MPSC, is not a basis for escaping the antitrust laws. There is no legislative mandate for the practice in Michigan. In fact, only Edison's "utility" activities are subject to MPSC regulation, i.e.,

> ". . . owning, . . . operating . . . facilities for producing, generating, transmitting, delivering or furnishing . . . electricity . . . for the public for compensation." MCLA 460.501.

Light bulb distribution is not one of those activities.

Despite the MPSC's statutory duty to ". . . make full investigation of all matters . . . submitted. . .", (MCLA

460.54), there is no evidence of regulatory consideration of any aspect of the program. Absent regulation, there is no basis for finding sovereign command.

Under Michigan's Constitution and its Supreme Court decisions, municipalities in Michigan, not the MPSC, are the repository of sovereign power over electric utilities. Orders of the MPSC, absent some express statutory mandate, and perhaps not even then, are not entitled to the weight accorded sovereign commands.

Accordingly, Cantor respectfully requests this Court to reverse the opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the trial court below, and remand this case to the District Court for further proceedings on the remaining issues.

ARGUMENT

I.

ANTITRUST EXEMPTIONS ARE ONLY GRANTED TO A STATE OR ITS OFFICERS OR AGENTS WHO ACT IN FURTHERANCE OF SOME STATE GOAL IN ACCORDANCE WITH A STATUTE. EDISON'S LIGHT BULB PROGRAM IS A PRIVATE BUSINESS ACTIVITY, HAS NONE OF THESE CHARACTERISTICS AND IS NOT ENTITLED TO EXEMPTION.

Exemptions from the antitrust laws by implication are strongly disfavored, see *e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963), because competition is our fundamental national economic policy, see *e.g., Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958). Edison is a privately owned utility. Investor owned utilities like any other private business are subject to the antitrust laws, *Otter Tail Power Company* v. *U. S.,* 410 U.S. 366 (1973).

Edison claims its practice of tying the sale of light bulbs to the sale of electricity is exempt under this Court's holding in *Parker* v. *Brown,* 317 U.S. 341 (1943). This Court has exempted only those activities in which the State, through its officers or agents, engage in furtherance of State business. In this case, the program is private business, initiated and carried out by private enterprise. Activities of private persons, whether "authorized", "prompted", or in some cases even when "commanded", have consistently been held not exempt from antitrust enforcement.

This Court's most recent analysis of the rights of States to regulate private business in derogation of the antitrust law is contained in *Goldfarb* v. *Virginia State Bar Association, et al.,* Slip op. No. 74-70 decided June 16, 1975. —— U.S. ——, 95 S.Ct. 2004. The activity complained of was the establishment of minimum fee schedules for private attorneys by the Virginia State Bar Association and the Fairfax County Bar Association. This Court decided that the activity of the defendants was "essentially a private anticompetitive activity, and in that posture cannot claim it is beyond reach of the Sherman Act." *Goldfarb* v. *Virginia State Bar Association, et al.,* Slip op. at page 18, decided June 16, 1975, —— U.S. ——, 95 S. Ct. 2004. Chief Justice Burger also stated:

> "The threshold inquiry in determining if anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.
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> "The fact that the State Bar is a state agency for some limited purposes does not create a antitrust shield that allows to foster anticompetitive practices for the benefit of its members." Slip op. at p. 16.

The Court held the activity not exempt, despite a record which revealed substantial involvement of State agencies coupled with the power to penalize noncompliance. The Court noted:

> "Enforcement has been provided by respondent Virginia State Bar, which is the administrative agency through which the Virginia Supreme Court regulates

> the practice of law in that state; membership in the State Bar is required in order to practice in Virginia, of course. Although the State Bar has never taken formal disciplinary action to compel adherence to any fee schedule, it has published reports condoning fee schedules, and has issued two ethical opinions indicating fee schedules cannot be ignored. The most recent opinion states that 'evidence that an attorney habitually charges less than the suggested minmum fee schedule adopted by his local bar association raises a presumption that such lawyer is guilty of misconduct. . .'" Slip. op. at pp. 2, 3, 4

The Court in *Goldfarb* relied on *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Olsen* v. *Smith,* 195 U.S. 332 (1904) for its decision. These three cases, taken together, highlight two necessary requirements for antitrust immunity. First, that the State's participation in the activity under attack must be pervasive, and, secondly, the business must be one in which the sovereign has a legitimate interest. The decisions in *Parker* v. *Brown,* and *Olsen* v. *Smith,* upon which this Court relied in *Goldfarb* upheld exemptions because both requirements were satisfied.

In *Parker* v. *Brown,* the Supreme Court held that a state created and enforced program for 1) limiting production, 2) setting prices, and 3) controlling marketing of raisins, established in accordance with California Agricultural Prorate Act was immune from challenge under the antitrust laws. The Prorate Act established a commission to adopt controlled growing and marketing arrangements for agricultural products. The commission was appointed by the governor and confirmed by the State senate.

In order to establish this threefold program for a particular agricultural product the California Act required a petition by at least ten producers followed by a public hearing and findings by the Commission that the institution of the program would "conserve agricultural wealth and prevent agricultural waste without causing unreasonable producer profits." *Parker* v. *Brown,* 317 U.S. 341, 346 (1943). A prorate committee for that crop then was appointed by the Commission and directed to develop a program for the particular crop. Following another hearing, the Commission had to approve this program by finding that it was "reasonably calculated to carry out the objectives of the Act." 317 U.S. 341, 347.

After a vote by growers, the raisin prorate program was adopted under this procedure.[4] Not only did the State create the program for raisins, but its agents following the rules and procedures set forth in the statute actively participated in marketing.[5]

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[4] An approved plan could not be implemented until consented to by 65 percent in number of the producers in an affected zone owning at least 51 percent of the acreage devoted to production of the regulated crop, 317 U.S. 341, 346-47.

[5] All raisins had to be delivered to receiving stations for grading. All the "sub-standard," but edible, raisins and 20 percent of the "standard" raisins were placed into a "surplus pool." Fifty percent of the "standard" raisins were placed in a "stabilization pool." The producers were paid specified advances for raisins delivered into the "surplus" and "stabilization" pools. The prorate committee undertook to market the raisins in each of the pools in accordance with certain rules, and to pay over to each producer his pro rata share of the proceeds. The remaining 30 percent of the standard raisins were not taken by the committee and could be sold by the producers themselves, but only at such time as authorized by the committee. 317 U.S. 341, 347-48.

After reviewing appropriate legislative history and the purpose of the Sherman Act, the Court found the State's activity exempt from the antitrust laws because:

> "It is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the State and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. 341, 350-51.
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> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of governmental policy." 317 U.S. 341, 352.

The Court in *Parker* clearly limited its decision.

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347, 48 L.Ed. 679, 698, 703, 704, 24 S.Ct. 436 (1904); and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. 341, 352.

The Court did not address itself to the question of when the acts of private enterprise taken pursuant to

state authorization or approval are exempt because California was so clearly the initiator and actor in the pursuit of what was legitimate state business. The existence of a complimentary and supporting federal agricultural policy further eased the way for the court, if not, considering the times, compelling the result.[8]

It cannot be stressed enough that in *Parker* it was the State of California conducting legitimate State business who was the initiator, enforcer and principal actor in the program attacked. The officers and agents of the State were following precise and detailed legislation passed to deal with a serious local problem. Indeed, it was the Director of Agriculture and members of the Prorate Advisory Commission who were named as defendants in the action.

Olsen v. *Smith*, 195 U.S. 332 (1904) and *Lowenstein* v. *Evans*, 69 Fed. 908 (1895) are the two decisions relied on by the Court in *Parker* for the proposition that the Sherman Act does not restrain sovereign acts of State

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[8] Recent commentators have viewed the existence of complimentary federal policy as an integral and necessary part of the result in *Parker*. Thus, Court of Appeals for the District of Columbia has noted:

> "*Parker* v. *Brown* involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, i.e., the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of federal antitrust policy." *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931, 937 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

See also Donnem, Federal Antitrust Law versus Anticompetitive State Regulation, 39 ABA Antitrust L.J. 950, 960. (1970).

governments. 317 U.S. 341, 352. Examination of these cases confirms that antitrust immunity is limited to activities in which only the State or its authorized agents engage mandated by the legislature for valid State policy reasons. In *Lowenstein,* the United States Court of Appeals refused to apply the Sherman Act to a state operated retail liquor monopoly. In *Olsen,* the State of Texas enacted a statute which licensed river and harbor pilots making them agents of the State. The statute provided that the governor was authorized to appoint for each port, whose population and circumstances warranted it, a five men board known as Commissions of Pilotage. The board was empowered to fix rates within a statutory maximum ". . . to be made by branch and deputy pilots for their services, to regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter". *Olsen* v. *Smith,* 195 U.S. 332, 339, 340. The statute granted the Governor broad authority to appoint as many "branch pilots" as necessary, each of whom was to hold office for two years, subject to removal by the Governor. Only a duly commissioned branch pilot or deputy thereof could engage in the business of pilotage. The Court, in holding that this anticompetitive scheme did not conflict with federal antitrust law, concluded that the pilots were "duly authorized agents of the state . . . performing the duties devolving upon them by law". 195 U.S. 332, 345. Texas, as well as the national government, in 1904, had a substantial interest in pilotage. To attract foreign ships into local harbors it was necessary that competent pilots be available at reasonable rates and therefore, Texas saw fit to be totally involved in the business of pilotage making it the State's business.

As in *Goldfarb,* earlier decisions of this court denied a state action exemption to private business activities. In *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904), this Court considered the question of whether actions of a privately owned company operating pursuant to a state statute were within the scope of the Sherman Act. In *Northern Securities,* the Court considered legislation passed in New Jersey authorizing holding companies. The Northern Securities Co., was formed for the purpose of owning the stock of both the Great Northern Railway Co. and the Northern Pacific Railway Co. who had formerly been competitors. The formation and operation of the holding company— purely private acts—were deemed violations of the Sherman Act even though New Jersey had given its blessing to the formation of holding companies by statute and by chartering Northern Securities.

Many years later, in *Schwegmann Brothers, et al.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), this Court once again had to decide the question of whether private business conduct compelled by state statute was exempt from the application of the Sherman Act. The Louisiana statute authorized enforcement of price fixing arrangements between manufacturers, distributors and retailers who agreed by contract to fix their prices and further authorized enforcement of such agreements on non-contracting retailers such as the defendant. Schwegmann had been cutting his retail prices on liquor contrary to the

statute authorizing enforcement of price fixing. Justice Douglas held that:

> "It should be noted in this connection that the Miller-Tyding Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v. *Brown*, 317 U.S. 341, 350." 341 U.S. 384, 389.

The foregoing review of Supreme Court cases dealing with the question of state action immunity from federal antitrust laws leads to the inescapable conclusion that this Court has never held private business activities to be exempt. This Court, favoring our antitrust policy, has uniformly refused to grant antitrust exemptions for private business activities even in the face of state compulsion. Consistent with this policy, the Court has stated:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom." *United States* v. *Topco Associates Inc.*, 405 U.S., 596, 610 (1972).

Perhaps, when there is state compulsion of a private business activity in furtherance of some fundamental public policy, an exemption from the antitrust laws could be justified. Exemption for Edison's light bulb program — a public relations device intended to sell more electricity by keeping the sockets full — cannot be justified.

II.

EDISON'S BRIEF AND SUPERFICIAL REFERENCE TO ITS LIGHT BULB PROGRAM IN ITS ELECTRICITY RATE SCHEDULE DOES NOT PROVIDE A BASIS FOR OVERCOMING OUR NATIONAL POLICY FAVORING ANTITRUST ENFORCEMENT.

A. With virtually no knowledge about the light bulb program the MPSC cannot be said to have commanded the activity.

Parker v. *Brown* established the state action immunity doctrine on a record which demonstrated that State officials, acting under a specific State legislative mandate, had directed the controlled raisin marketing program after public hearings and specific findings that the program would conserve agricultural resources without unduly favoring raisin growers. The finding that the State's designated agents carefully considered the entire program including the growing, pricing and marketing restrictions proposed by the growers was central to the decision. See 317 U.S. 341, 347 (1943).

Despite a statutory duty to the contrary, the record in this case contains no evidence that either the MPSC or any of its predecessors have ever considered any aspect of the light bulb program. The MPSC has a duty "to make full investigation as to all matters" involving the fixing or determination of rates and charges or making of rules or conditions of service. MCLA 460.54

No description of the light bulb distribution program in any rate schedule prepared and submitted by Edison has ever been questioned by, or modified at the direction or request of the MPSC, although Edison has changed

the description from time to time, *e.g.*, compare (214a, 260a, 264a, 269a).

Edison has, without regulation over the years, among other activities in operating and maintaining the light bulb program used its own service centers and employed private distribution agents (114a, 192a) changed at will the size, type and number of bulbs available to customers (109a-111a, 157a) established extensive internal rules for administering the program (196a) determined itself that more costly longer life bulbs which produced less light for the same electricity as commercially available bulbs were "better" for itself and its customers (324a, 33a, 112a, 113a, 157a, 158a) and falsely described, both to its customers and in its rate sheets, the bulbs as "free" and the program as an "exchange" when in fact, a charge for bulbs is concealed within the electricity charge (272a-275a).[7] In sum, no evidence has been presented that the MPSC or its predecessors ever considered, reviewed, investigated or discussed any aspect of Edison's light bulb distribution program.

Surely, a command made in ignorance—even if it were the sovereign command of a state—cannot take precedence over the antitrust laws. An order entered in ignorance where a regulatory agency has a duty to investigate is not entitled to any weight. See *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U.S. 626 (1945); *In the Matter of the Application of*

[7] The facts, set out at pages 6-9 infra, detail more fully the matters which the MPSC has not reviewed.

Hawaiian Electric Company Inc. for Approval of Rate Increases and Revised Rate Schedules,—CCH Utilities Law Reporter—State para. 22,200 (Supreme Court of Hawaii No. 5374, decided May 7, 1975), *cf. Continental Ore* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 706 (1961).

The comments of the Supreme Court of Hawaii are particularly appropriate here. In setting aside a commission ordered promotional program designed to sell more electricity, the Court said:

> "It is not our intention to belabor the obvious, but the stark reality of the situation is that our energy problems and our environmental concerns are here to stay. In the face of dwindling oil supplies and spiralling costs, promotional practices which are wasteful or which only serve to fuel the energy crisis should be viewed by a regulatory agency with extreme caution." *In the Matter of the Application of Hawaiian Electric Company, Inc. for Approved Rate Increases and Revised Rate Schedule, supra,* at p. 50,488-9.

Where the MPSC has not even considered the program, there is certainly no justification for exempting Edison's energy-wasting lamp program.

The lower federal court decisions in the area of state action exemptions also support Cantor's contentions that regulatory review is necessary. In *Macom Products Corp.* v. *American Telephone and Telegraph Co.,* 359 F. Supp. 973 (C.D. Cal. 1973), the court considered the rate schedule adopting procedures of several states. The rate schedules under attack limited plaintiff's ability to sell equipment to interconnect with defendant telephone sys-

tem. The court denied an antitrust exemption, even in States where adversarial hearings took place, because there was no evidence that the agencies exercised considered judgment about the particular practice under attack. 359 F. Supp. 973, 977. In *Chastain, et al.* v. *American Telephone and Telegraph Co.*, Federal Court D.C., civil action No. 2088-70 filed October 1, 1975, 1975-2 CCH Trade Cases para. 60,519, the state action exemption was denied because, among other reasons, ". . . it cannot be assumed that the state agencies understood that the wording of the tariffs . . . " would result in the anticompetitive activity. 1975-2 CCH Trade Cases para. 60,519 at p. 67,299.

The District Court denied immunity in *Marnell* v. *United Parcel Service*, 260 F. Supp. 391, 410, 411 (N.D. Cal. 1966) because the agency had no knowledge of defendant's discriminatory contract rates. In *George R. Whitten, Jr. Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), cert. denied 400 U.S. 850, exemption was denied because there was no consideration by the state agency of the effect on competition. In *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir. 1971), cert. denied 404 U.S. 1047 (1972), the court refused an exemption to an agency order issued on false information. In *International Telephone and Telegraph Corp.* v. *General Telephone and Electrical Corp.*, 351 F. Supp. 1153 (D. Hawaii 1972) the court denied the state action defense because the agencies had not considered the anticompetitive effect of the mergers attacked. The concern of these courts about the inadequacy of the regulatory agency process is widely shared. See Farris

and Sampson, *Public Utilities Regulations, Management and Ownership*, pp. 161-167 (1974).[8]

The mainstream of authority which deals with the state action defense of an antitrust claim require a careful factual inquiry of the extensiveness and quality of the State regulation which is said to justify antitrust immunity. An analysis of the extent and quality of the MPSC's inquiry into Edison's light bulb program reveals that there has been no such inquiry. Accordingly, whatever action the MPSC may have taken should not be considered a sovereign command to overcome the antitrust laws.

B. The MPSC's limited authority precludes its regulation of the light bulb program.

MCLA 460.6 provides:

> "The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all *public utilities* in the state except . . . *as otherwise restricted by law.*" (emphasis supplied)

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[8] The extent of concern about the inadequacies of the regulatory process has reached Congress. Several bills have recently been introduced in the House of Representatives which have as their object improving competition in the regulated industries through reform of the regulatory process. One Bill, H.R. 10171 introduced on October 8, 1975, 94th Cong., 1st Session, has been sponsored by eighteen Congressmen. The Bill seeks to establish a National Commision on Regulatory Reform. Another Bill, H.R. 10100, introduced on October 8, 1975, 94th Cong., 1st Session, specifically seeks: "To reform electric utility rate regulation, to provide for more effective planning of bulk power facilities, to assure reliability of bulk power supplies, to strengthen State electric utility regulatory agencies, and to establish the Federal Energy Commission."

To understand how the MPSC is "otherwise restricted by law" in regulating "public utilities" it is necessary to examine other relevant sections of MCLA Chapter 460 and applicable decisions of the Michigan Supreme Court.

1. In Michigan, Electric "public utilities" by definition produce, transmit, and sell electricity. The distribution of light bulbs is not one of these activities and is therefore not within the ambit of MPSC regulation.

Public utilities are defined in MCLA 460.501 as follows:

> "The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation."

This definition should be given the same meaning in all places in the same statutory scheme unless a contrary intent is manifest. *Gonzales* v. *Barber,* 207 F.2d 398 (9th Cir. 1953), aff'd 347 U.S. 637; *Sampsell* v. *Straub,* 194 F.2d 228 (9th Cir. 1952), cert. den. 343 U.S. 927.

Michigan decisions confirm that a public utility activity is limited to providing essential services, not the selling of goods in ordinary commerce. In *Swan* v. *Williams,* 2 Mich. 427 (1852) a utility was described as a private business whose object is to provide services essential to the people which the state would otherwise have to provide. 2 Mich. 427, 435. In *Ten Broek* v. *Miller,* 240 Mich. 667 (1927), a company was denied the right to cut off electric and water service to a customer because he refused to install a septic tank. The basis of the decision

was that the providing of water was such an essential service that it could not be made conditional.

In *Toebe* v. *City of Munising,* 282 Mich. 1, 6, 275 NW 244 (1937) the defendant city was denied the right to continue in the business of selling coal despite its authority to ". . . operate any public utility." because the sale of coal was not an essential service. Accord, *Baker* v. *City of Grand Rapids,* 142 Mich. 687, 106 NW 208 (1906)

In our system of free enterprise and private property one can, and indeed must, quarrel with a utility's extension of its monopoly to a nonessential activity. Were Edison to undertake a rate structure that included the collection of the price of electric motors, stoves, refrigerators and all manner of appliances with related distribution of these items, the sharp distinction between that aspect of its activity dealing with essential services and that aspect of its activity which constituted an unnecessary intrusion into private, free enterprise becomes readily apparent.

The question of whether light bulb distribution is a utility function has been examined in other states. In Massachusetts, Connecticut, Illinois and Wisconsin, a light bulb distribution program such as Edison's has been found to be an unreasonable and unlawful extension of a utility's monopoly. It has been consistently held that such ventures constitute unreasonable extensions of the monopoly of electric utilities to private business.

As long ago as 1932, at the behest of a dissatisfied customer, the Illinois courts invalidated a light bulb service similar to defendant Edison's which had been approved by the Illinois Commerce Commission. *Consumers' Sanitary Coffee & Butter Stores* v. *Illinois Commerce Com-*

mission, 348 Ill. 615, 181 N.E. 411 (1932). The Illinois Supreme Court condemned the service on two primary grounds:

> "(R)ate 'A2' gives to [the utility] a practical monopoly of the lamp business among its customers to the detriment of other dealers. Such monopoly is unlawful.
> . . .
> Another reason for holding rate 'A2' unlawful is that, even if a consumer should buy his lamps from a department store, he would nevertheless be compelled to pay appellant the lamp charge under rate 'A2'. This is an unreasonable provision and results in a violation of the consumer's right to purchase to his advantage and where he desires." *Consumers' Sanitary Coffee & Butter Stores* v. *Illinois Commerce Commission,* 348 Ill. at 618-19, 181 N.E. at 412-13.

Regulators in Massachusetts and Wisconsin forced the abandonment of the light bulb program. *Re Customers of Edison Electric Illuminating Co. of Boston,* 5 P.U.R. (N.S.) 369, 386 (Mass. Dep't of Pub. Utilities 1934); *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (N.S.) 517, 525-26 (Wis. Pub. Serv. Comm'n 1935). The Wisconsin Public Service Commission went so far as to declare:

> "The Commission finds and determines that the company's present lamp renewal practice embodies many inconsistent, inequitable, unreasonable, and discriminatory features and that the discontinuance of lamp renewals is reasonable under the present circumstances." *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (N.S.) 517, 526 (Wis. Pub. Serv. Comm'n 1935).

See also, *Re Hartford Electric Light Co.,* Dkt. No. 10047, P.U.R. 3d, Annual 1962, at 306 (Dec. 29, 1961).

There is no statute of the State of Michigan which purports to regulate the light bulb business. Edison must show that the distribution of light bulbs falls within the statutory definition of a "public utility" activity in order to use the MPSC approved rate schedule as an antitrust shield. They have not done so. There has been no showing, and Cantor submits there can be no showing, that the distribution of light bulbs is a public utility activity.

2. In addition to the limitation imposed by the definition of a "Public Utility", other Michigan statutes and cases further restrict the authority of the MPSC.

In *Huron Portland Cement Co.* v. *Michigan Public Service Commission,* 351 Mich. 255; 88 N.W.2d 492 (1958), the Michigan Supreme Court, in considering the language of MCLA 460.6, to wit: "The Michigan public service commission is hereby vested *with complete power and jurisdiction to regulate all public utilities . . .*", rejected the argument of MPSC plenary authority.

> "At the outset we will observe that the Michigan public service commission has no common law powers. . . .
> "We turn, then, to the statutory enactments. Appellant first cites to . . . (MCLA 460.6). . . .
> "The broad language, however, furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards . . . but there would have been no need whatever for the many

> statutes enacted . . . vesting specific powers in the commission." 351 Mich. 255, 262-63; 88 N.W.2d 492, 496-97.

The Court continued by citing MCLA 460.551 et seq. exemplifying the specific statutes which determined MPSC's authority. Id. 263n. Accord, *Detroit Edison* v. *City of Wixom,* 10 Mich. App. 218; 159 N.W.2d 230 (1968) reversed on other grounds 382 Mich. 693.

MCLA 460.551 provides:

> ". . . the transmission and distribution of electricity in or on the public highways, streets and places, the rate of charge to be made to the consumer for the electricity so transmitted and distributed and the rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation as in this act provided.

MCLA 460.552 provides:

> "The Michigan public utilities commission, hereinafter referred to as 'the commission' *shall have control and supervision of the business of transmitting and supplying electricity* as mentioned in the first section of this act and no public utility supplying electricity *shall put into force any rate or charge for the same* without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge." (emphasis supplied).

There is certainly no room in the language of MCLA 460.552 for permitting the MPSC to do other than regulate the transmitting, supplying and setting the rates for electricity. It is clear

that the "conditions of service" being spoken of in MCLA 460.551 concern the transmission of electrict power and nothing else. This follows because MCLA 460.551 states that the matters covered "shall be subject to regulations as in this Act provided". After providing for the setting of rates in MCLA 460.552 the remaining provisions deal with use of streets and alleys, transmission, inspection, processing of complaints and in connection therewith the production facilities, the maintenance of property, and the maintenance of internal accounting systems. There is simply nothing in the Act which by any reasonable construction would give the commission authority to require Edison to distribute light bulbs.[9]

A recent decision in the United States Court of Appeals for the Third Circuit supports the position that general

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[9] By the same token the MPSC has no authority to interfere with *elimination* of the cost of the program from Edison's accounts and *elimination* of the reference in the rate schedule as long as the resulting rate for electricity is reasonable. As a matter of fact, Edison can proceed to obtain this adjustment as it did in 1964, without a public hearing under MCLA 460.6(a).

In 1964, in case no. U-1791, Edison obtained without public hearing, authorization to reduce its rate to commercial users. (332a) The Commission order provided that the lamp program is to be withdrawn to effect the rate reduction. Edison argued below that this 1964 order evidenced the MPSC knowledge of and control over the light bulb program. In fact, the 1964 rate adjustment order shows that the relationship of expenses to rate is the concern of the MPSC in keeping with its limited statutory authority.

statutory grants of authority cannot be used to shield anticompetitive conduct, even when engaged in by governmental agencies. *Duke & Co., Inc.* v. *Foerster, et al.,* No. 74-2047 CCH Trade Cases para. 60, 433, filed August 5, 1975. The Court in the instant case need not go as far as the *Duke* decision to reverse the opinion below because Michigan statutes specifically limit the MPSC, and the conduct here is private.

3. Michigan has delegated its sovereign authority over public utilities to the municipalities, not to the MPSC.

Parker v. *Brown* held that antitrust laws were not to apply to activities directed or commanded by a State in its capacity as a sovereign. 317 U.S. 341, 353. This specific holding supported the result in *Goldfarb* v. *Virginia State Bar Association,* Slip Op. No. 74-70 (decided June 16, 1975 —— U.S. ——, 95 S.Ct. 2004. It was the notion of dual sovereignty within the federal system that required, the Court felt, in *Parker* an exemption for state government activity.

Sovereignty is the power to exercise supreme dominion and authority subject only to the basic compact between the government and the governed. *People ex rel. Attorney General* v. *Tool,* 35 Colo. 225, 86 P. 224, 226 (1905). It is the power to make law, *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 29 S. Ct. 511 (1909), and to govern without dependence on any other power, *Chisholm* v. *State of Georgia,* 2 U.S. (Dallas) 419, 455 (1793).

The MPSC is not the recipient of the sovereign power of the State of Michigan over public utilities. Under the Constitution of the State of Michigan as interpreted

frequently by the Michigan Supreme Court, ultimate authority to regulate public utilities in Michigan rests with the municipalities! The Michigan Constitution, since 1908, has reserved to cities, villages and townships *local control* over their streets and alleys. It is from franchises granted by the municipalities to use streets and alleys, not from the state, that Edison obtains its monopoly. The applicable Constitutional provisions which were enacted into the fundamental law in 1908 are now contained in Article VII of the Constitution of 1963. For clarity and ease of reference they are quoted as they appear in the Constitution of 1963:

> "Township Public Utility Franchises. Sec. 19. No organized township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless the proposition shall first have been approved by a majority of the electors of such township voting thereon at a regular or special election. . ."
>
> "Highways, Streets, Alleys, Public Places; Control, Use by Public Utilities, Sec. 29. No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city, or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

"Franchises and licenses, duration, Sec. 30. No franchise or license shall be granted by any township, city or village for a period longer than 30 years."

Edison's rights to operate as a utility are contained in the franchises it receives from the municipalities. The MPSC does not grant franchises, it never has, and it could not do so and in fact, Edison in its answer to the complaint admits that its franchise does not come from the MPSC. (Compare 3a, para. 2 with 21a, para. 2, 54a.) Otherwise, there would be interference with the area of local control over streets and alleys which is specifically the subject of constitutional protection.[10] See, *City of Mt. Pleasant* v. *Michigan Consolidated Gas Company,* 325 Mich. 501, 39 NW2d 49 (1949). Many municipalities have agreed with Edison that rates set by MPSC will be the maximum allowable rate in that community. (54a) The municipalities can take that right away when franchises come up for renewal. Likewise, the municipalities can limit or eliminate Edison's light bulb program even if the MPSC affirmatively decided the program was desirable.

In 1968, Edison claimed that an MPSC's order concerning right-of-ways was superior to a zoning determination by the City of Wixom. *Detroit Edison Company* v. *City of Wixom,* 10 Mich. App. 218, 159 N.W. 2d 230 (1968) rev'd on other grounds, 382 Mich. 673 Edison citing MCLA 460.6 claimed:

[10] Judge Feikens in his opinion cited MCLA 460.502 which requires an electric utility wishing to displace a company already providing service to obtain a certificate of convenience and necessity from the MPSC. MCLA 460.503, which Judge Feikens did not specifically cite, conditions issuance of that certificate upon the newcomer's first having obtained a municipal franchise.

1. "That by statutory grant of authority the public service commission preempted the field of regulation of electric utilities . . ." 10 Mich. App. 218, 223, and
2. That the zoning determination was unlawful.

The Appellate Court, relying on *Huron Portland Cement Co.* v. *Michigan Public Service Commission,* 351 Mich. 255, 88 N.W. 2d 492 (1958) denied Edison's claim of plenary jurisdiction on the MPSC and stated:

"The only specific powers given the commission to regulate the transmission of electricity is the transmission of electricity through highways act, . . . (MCLA 460.551 et seq.) . . . This act however is limited to transmission over public streets, highways and places and therefore does not include plaintiff's transmission over a private right-of-way. . .

. . . We can find no power or provision in the statutes precluding a municipality from enacting reasonable regulations as to electrical utilities. *Detroit Edison Company* v. *City of Wixom, supra,* at pp. 225, 226"

The assertion of plenary authority by the Michigan regulatory agency has been denied when confronted with utility rate provisions of local franchises. *Village of Plainwell* v. *Eesley Light and Power Co.,* 214 Mich. 461, 183 NW 66 (1921); *City of Saginaw* v. *Consumers Power Co.,* 213 Mich. 460, 182 NW 146 (1921); *Consumers Power Co.* v. *Michigan Public Utilities Commission,* 270 Mich. 213, 258 NW 250 (1935);

Any remaining doubt that Section 460.6 is merely a grant of jurisdiction is put to rest by MCLA 460.557 which provides, inter alia:

". . . the commission shall in no case have power to change or alter the price fixed in or regulated

by or under any franchise heretofore or hereafter granted by any city, village or township. . ."

A similar provision is contained in MCLA 460.54. In *City of Mt. Pleasant* v. *Michigan Consolidated Gas Company*, 325 Mich. 501, 515, 39 NW2d 49 (1949), this provision took precedence over an assertion of plenary power under MCLA Sec. 460.6.

Plaintiff has shown that there are a multiplicity of reasons why the sovereignty of the State of Michigan is not involved in creating and maintaining Edison's light bulb program. Reversal here for any one of the reasons suggested will not impose upon the sovereignty of the State of Michigan or the principles of dual sovereignty within our federal system.

III.

EDISON IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Under Rule 56 of the Federal Rules of Civil Procedure summary judgment should not be granted if, as a matter of law, the moving party is not entitled to the relief it seeks. Cantor has shown that Edison's light bulb program is a private business activity; that several tribunals have found similar programs to fall far outside the limits of a "public utility" activity which might otherwise entitle it to some protection; that the MPSC has never considered the program and therefore cannot be said to have commanded it; that the MPSC lacked the sovereign authority to require the program or clothe it with continuing antitrust immunity. As a matter of law, therefore, Edison is not entitled to summary judgment on grounds of a state action exemption to Cantor's antitrust claims.

CONCLUSION

Cantor respectfully requests this Court to reverse the opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the trial court below, and remand this case to the District Court for further proceedings on the remaining issues.

Dated Chicago, Illinois, November 20, 1975

Respectfully submitted,

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I.

STATUTORY APPENDIX

Act of Congress, July 2, 1890, Sherman Act c. 647 (26 Stat. 209), Secs. 1, 2 (15 U.S.C. Secs. 1, 2):

§ 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Frovided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of Congress, Oct. 15, 1914, Clayton Act. c. 323, Sec. 4, Part I, Stat. 730, Sec. 4 (15 U.S.C. Sec. 14):

§ 14.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

IV Michigan Compiled Laws, Chapter 460, Secs. 1, 4, 6, 6a, 54, 501, 502, 503, 551-557:

460.1

Sec. 1. A commission to be known and designated as the "Michigan public service commission" is hereby created, which shall consist of 3 members, not more than 2 of whom shall be members of the same political party,

appointed by the governor with the advice and consent of the senate. Each member shall be a citizen of the United States, and of the state of Michigan, and no member of said commission shall be pecuniarily interested in any public utility or public service subject to the jurisdiction and control of the commission. During his term no member shall serve as an officer or committee member of any political party organization or hold any office or be employed by any other commission, board, department or institution in this state. No commission member shall be retained or employed by any public utility or public service subject to the jurisdiction and control of the commission during the time he is acting as such commissioner, and for 6 months thereafter, and no member of the commission, who is a member of the bar of the state of Michigan, shall practice his profession or act as counselor or attorney in any court of this state during the time he is a member of said commission: Provided, however, This shall not require any commissioner to retire from, or dissolve any partnership, of which he is a member, but said partnership, while he is a member of the commission, shall not engage in public utility practice. Immediately upon the taking effect of this act, the offices of the present members of the Michigan public service commission are hereby abolished, and the members of the Michigan public service commission as herein created shall be appointed by the governor with the advice and consent of the senate, for terms of 6 years each: Provided, That of the members first appointed, 1 shall be appointed for a term of 2 years, 1 for a term of 4 years, and 1 for a term of 6 years. Upon the expiration of said terms successors shall be appointed with like qualifications and in like manner for terms of 6 years each, and until their successors are appointed and qualified. Vacancies shall be filled in the same manner as is provided for appointment in the first instance. As amended P.A. 1951, No. 275, § 1, Eff. Sept. 28.

460.4

Sec. 4. The Michigan public utilities commission, having failed and refused to properly carry out the legislative mandates with respect to public safety, and having failed and refused to properly enforce the provisions of the several acts conferring jurisdiction upon it with respect to the use of he various highways of the state in a safe and proper manner, is hereby abolished, and immediately upon the taking effect of this act said Michigan public utilities commission shall cease to exist, and the tenure of office of the members thereof and other employment of each employe of said commission shall be thereby terminated. All the rights, powers, and duties vested by law in said Michigan public utilities commission, and in the Michigan railroad commission and transferred to the Michigan public utilities commission, shall be deemed to be transferred to and vested in the Michigan public service commission hereby created, and shall hereafter be exercised and performed by said commission. All hearings, matters and proceedings of whatsoever nature pending before said Michigan public utilities commission or any court shall not be terminated or abated, but shall be considered to have been transferred to the Michigan public service commission hereby created, and shall be continued, carried on and completed in the same manner and subject to the same rights, privileges, immunities and procedure as though the same were carried on and completed by said Michigan public utilities commission, without any requirement of amendment, modification, or change by reason of the transfer hereby made. Said Michigan public service commission shall have and exercise all rights and privileges and the jurisdiction in all respects as has been conferred by law and exercised by the Michigan public utilities commission under the laws of this state; and wherever reference is or has been made in any law to the "commission" or to the "Michigan public utilities commission" or the "Michigan railroad commission" such reference shall be construed to mean the Michigan public service commission hereby provided for, without further amendment or change thereof. Any order or decree of the Michigan

public service commission shall be subject to review in the manner now provided by law for reviewing orders and decrees of the Michigan railroad commision or the Michigan public utilities commission. In no case, however, shall any injunction or other order issue suspending or staying any decree or order of the Michigan public service commission except after due notice to the commission and a reasonable opportunity for hearing thereon. All appeals from orders of the Michigan public utilities commission initiated under the provisions of any other act and now pending in any court shall not be dismissed, terminated, or abated but shall be continued, carried on, and completed exactly as though this section had been in effect at the time such appeals were taken and such appeals initiated under the provisions of this section. The Michigan public service commission shall be substituted as defendant in all such causes.

460.6

Sec. 6. Powers and jurisdiction. The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.

Railroads. The Michigan public service commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and con-

ferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan public utilities commission, and defining their powers over utilities.

Construction and operation of gas service and pipe line facilities. It may make reasonable rules and regulations to provide for the protection of the public in the construction and operation of facilities by public utilities rendering gas service and by companies operating a pipe line or lines for the transportation of gas, or any petroleum products that are gases at normal atmospheric temperatures and pressures: Provided, however, That such power and jurisdiction shall not extend to field gathering lines in either gas producing fields or gas storage fields except as such lines may cross state trunkline highways or railroads. As amended P.A.1952, No. 240, § 1, Eff. Sept. 18; P.A.1960, No. 44, § 1, Imd. Eff. April 19.

460.6a

Sec. 6a. When any finding or order is sought by any gas, telephone or electric utility to increase its rates and charges or to alter, change or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. When such utility shall have placed in evidence facts relied upon to support its petition or application to so increase its rates and charges, or to so alter, change or amend any rate or rate schedules, the commission, pending the submission of all proofs by any interested parties, may in its discretion and upon written motion by such utility make a finding and enter an order granting partial and immediate relief, after first having given notice to the interested parties within the service area to be affected in the manner ordered by the commission, and after having afforded to such interested parties reasonable opportunity for a full and complete hearing: Provided, That no such finding or order shall be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report: And provided further, That any alteration or

amendment in rates or rate schedules applied for by any public utility which will result in no increase in the cost of service to its customers may be authorized and approved without any notice or hearing. Nothing contained in this section shall be construed to prohibit the commission from permitting the incorporation of fuel adjustment clauses in rate schedules for service other than domestic service pursuant to notice and hearing thereon. P.A.1939, No. 3, § 6a, added by P.A.1952, No. 243, § 1, Eff. Sept. 18, 1952, as amended P.A.1955, No. 172, § 1, Imd. Eff. June 13.

460.54

Sec. 4. In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use. Subject to the provisions of this act the said commission shall have the same measure of authority with reference to such utilities as is granted and conferred with respect to railroads and railroad companies under the various provisions of the statutes creating the Michigan railroad commission and defining its powers and duties. The power and authority granted by this act shall not extend to, or include, any power of regulation or control of any municipally owned utility; and it shall be the duty of said commission on the request of any city or village to give advice and render such assistance as may be reasonable and expedient with respect to the operation of any utility owned and operated by such city or village. In no case shall the commission have power to change or alter the rates or charges fixed in, or regulated by, any franchise or agreement heretofore or hereafter granted or made by any city, village or township. It shall be competent for any municipality and any public utility operating within the limits of said municipality, whether such utility is operating under the terms of a franchise or otherwise, to join in submitting to the commission any question involving the fixing or determination

of rates or charges, or the making of rules or conditions of service, and the commission shall thereupon be empowered, and it shall be its duty to make full investigation as to all matters so submitted and to fix and establish such reasonable maximum rates and charges, and prescribe such rules and conditions of service and make such determination and order relative thereto as shall be just and reasonable. Such order when so made shall have like force and effect as other orders made under the provisions of this act. In any case where a franchise under which a utility is, or has been, operated, including street railways, shall have heretofore expired or shall hereafter expire, the municipality shall have the right to petition the commission to fix the rates and charges of said utility in accordance with the provisions of this act, or to make complaint as herein provided with reference to any practice, service or regulation of such utility, and thereupon said commission shall have full jurisdiction in the premises.

460.501

Sec. 1. The term "municipality", when used in this act, means a city, village or township.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission.

460.502

Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly,

or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

460.503

Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business.

460.551

Sec. 1. When electricity is generated or developed by steam, water or other power, within 1 county of this state, and transmitted and delivered to the consumer in the same or some other county, then the transmission and distribution of the same in or on the public highways, streets and places, the rate of charge to be made to the consumer for electricity so transmitted and distributed and the rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation as in this act provided.

460.552

Sec. 2. The Michigan public utilities commission, hereinafter referred to as "the commission" shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first section of this act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge.

460.553

Sec. 3. Any person, firm or corporation engaged or organized to engage in any such business of transmitting and supplying electricity in 1 or more counties of this state shall, with the consent of the duly constituted city, village and township authorities of the cities, villages and townships in or through which it operates or may hereafter propose to operate, have the right to use the highways, streets, alleys and other public places of such cities, villages and townships: Provided, That in all cases each transmission line used shall have insulation and conductivity in accordance with its voltage. In case it has or procures a franchise from any city, village or township or a right to do business therein, it may transact a local business therein. Nothing herein contained shall be construed to impair any right possessed by any village or township to the reasonable control of its streets, alleys and public places in all matters of mere local concern.

460.554

Sec. 4. Every person, firm or corporation erecting any lines for the transmission of electricity in or through the highways, streets or public places of 1 or more counties of this state shall, from time to time, as and when required to do so by the commission, prepare and file with the commission such data and information as shall be required relative to the method and manner of the construction of such lines, the franchise or consent under which said lines were constructed or are being maintained, and such other information as the commission may reasonably require. The commission may require the filing with it of detailed specifications covering the type of construction of such lines. Such specifications shall show the details of construction of lines of various voltages; and after such specifications have been approved by the commission, all lines built by such person, firm or corporation must be constructed according thereto. The height of such lines at all highway crossings shall be not less than 22 feet; and at railroad crossings shall be in accordance with the regulations of the commission made under authority of law.

The commission shall have the right to require all poles used in the transmission of electricity as aforesaid, to be stenciled or otherwise marked with the name of the owner thereof.

460.555

Sec. 5. The commission shall have the power to inspect and examine all such electrical apparatus already installed in any public highways, streets or places and all such apparatus hereafter installed, and to investigate from time to time the method employed by persons, firms or corporations transmitting and supplying electricity, and shall have power to order such improvements in such method as shall be necessary to secure good service and the safety of the public and of those employed in the business of transmitting and distributing such electricity, and of any persons liable to be injured by the erection, maintenance and use of such apparatus.

460.556

Sec. 6. The commission shall have power in its discretion to order electric current for distribution to be delivered at a suitable primary voltage, to any city, village or township through which a transmission line or lines may pass; to order service to be rendered by any such electric utility in any case in which it will be reasonable for such service to be ordered; prescribe uniform methods of keeping accounts to be observed by all persons, firms or corporations engaged in such business of transmitting and supplying electricity, and to keep informed as to the methods employed by all electric utilities in the transaction of their business; and to see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law. It shall have power to require of such persons, firms or corporations annually a verified report upon such form and giving such information as will enable the commission to better discharge the duties imposed upon it hereby; and shall also have power to require from all electric utilities in the state such information as the commission may need

at any time in connection with the performance of the duties imposed upon it by this act. Said commission shall also have power, in connection with any rate or service hearing or investigation, to make such audit and analysis of the books and records of the utility, and such inventory and appraisal of its property as may be necessary in connection with the duties imposed upon the commission by this act; and in any such case the commission shall keep a record of all expenses incurred by it in connection with its investigation of the affairs and property of the said utility and during the progress or at the conclusion of its work, shall state the amount thereof in writing to the said utility and said utility shall pay into the treasury of the state the amount of such expense at such times and in such manner as the commission may by order require. Said moneys when so paid into the state treasury shall go to the credit of the Michigan public utilities commission, and are hereby appropriated to the payment of its expenses.

460.557

Sec. 7. Upon complaint in writing by any consumer or city, village, or township, by its duly constituted common or village council or township board, or other duly constituted authority of such city, village or township, relative to the price of the electricity sold and delivered in such municipality, or with reference to the service rendered or any other matter of complaint, the commisison shall investigate such complaint and may by its agents, examiners, inspectors, engineers and accountants inspect the system and method used in transmitting and supplying electricity and examine or cause to be examined the books and papers of such person, firm or corporation pertaining thereto. The commission shall cause notices of such complaint with a copy thereof to be served on the person, firm or corporation complained of or affected thereby which shall have a right to be heard in respect to the matter complained of at a convenient time and place to be fixed in such notice. After such investigation and hearing, the commission within lawful limits may by order fix the price of elec-

tricity to be charged by such person, firm or corporation, and the price so fixed, of which such person, firm or corporation shall have notice, shall be the price to be charged until the commission shall again fix the price to be charged therefor. Said commission may also by order establish such rules and conditions of service as shall be just and reasonable. In determining the proper price, the commission shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price to be fixed for supplying electricity, including cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of service to the consumer, the connected load, the hours of the day when used and the quantity used each month: Provided, however, That the commission shall in no case have power to change or alter the price fixed in or regulated by or under any franchise heretofore or hereafter granted by any city, village or township: Provided further, Where identical or substantially identical rates prevail or are established, or shall hereafter be established in 2 or more contiguous municipalities or communities served or whose inhabitants are served by the same person, firm or corporation, the territory so served and to be served shall be treated as a unit for the purpose of fixing rates and no such rate or rates shall be changed with respect to 1 or more of such municipalities or communities so as to establish any difference of rate within the territory so served, unless and until it shall be shown that the continuance of such identical or substantially identical rate or rates will work substantial hardship to some municipality or person, firm or corporation affected thereby. The prices, rates and charges of every electric utility shall be just and reasonable and no consumer shall at any time be charged more or less than other consumers are charged for like contemporaneous service rendered under similar circumstances and conditions, and if any electric utility doing business within this state shall directly or indirectly by any special rate, rebate, draw-back or other device, charge, demand, collect or receive from any person or persons,

copartnership or corporation, a greater or less compensation for any service rendered, furnished or performed, than it charges, demands, collects or receives from any other person, or persons, copartnership or corporation, for rendering, furnishing or performing for him or them a like contemporaneous service, such electric utility shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. It shall further be unlawful for any person, copartnership or corporation, directly or indirectly to ask, demand or accept any rebate, drawback or other device whereby he or they shall obtain electric service for any less rate than that charged others in like circumstances. The provisions of Act No. 419 of the Public Acts of Michigan for the year 1919, shall, so far as applicable, govern the hearings before the said commission herein provided for, and the commission shall have power and authority to make, adopt and enforce rules and regulations for the conduct of its business and the proper discharge of its functions hereunder, and all persons dealing with the commission or interested in any matter or proceeding pending before it shall be bound by such rules and regulations. The provisions of Act No. 300 of the Public Acts of 1909, as amended and now in force, shall apply as to appeals from any order of the commission to the circuit court and from the circuit court to the supreme court.

Michigan Constitution, Article VII, Secs. 19, 29, 30:

Township Public Utility Franchises, Sec. 19. No organized township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless the proposition shall first have been approved by a majority of the electors of such township voting thereon at a regular or special election.

Highways, Streets, Alleys, Public Places; Control, Use by Public Utilities, Sec. 29. No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Franchises and Licenses, Duration, Sec. 30. No franchise or license shall be granted by any township, city or village for a period longer than 30 years.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

Questions Presented

Does a state regulatory commission's order which affirmatively approves an electric utility's tariff and requires the utility to adhere to the rates and services in the tariff constitute a command of the state which exempts the utility from the federal antitrust laws for adhering to the tariff?

Do the federal antitrust laws prevent a state regulatory commission from approving, without a special hearing, a public utility's service offering which reduces the cost of electric lighting to the utility's customers?

Should petitioner be obliged to invoke available state remedies before being allowed to bring a federal treble damage action against a state approved service offered by a regulated public utility?

Statement of the Case

A. Proceedings Below

The present case is a purported class action which seeks treble damages under the federal antitrust laws against The Detroit Edison Company ("Detroit Edison") on behalf of the named plaintiff Lawrence Cantor ("Cantor"), a retail drug store proprietor in Detroit, Michigan, and all others similarly situated.[1] Plaintiff commenced this action on July 6, 1973 in the Eastern District of Michigan, Southern Division (2a),[2] with federal jurisdiction being invoked pursuant to 28 U.S.C. § 1337.

Plaintiff's complaint alleges that Detroit Edison's supplying of light bulbs to its residential customers constitutes a violation of Section 2 of the Sherman Act (15 U.S.C. § 2) and Section 3 of the Clayton Act (15 U.S.C. § 14).[3]

1. No motion for class action determination has yet been made.

2. All references are to pages in the Appendix.

3. Petitioner states in his brief that he has alleged a tying arrangement in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), Brief for the Petitioner ("Petitioner's Brief") at 3. Petitioner's complaint (2a-20a) does not allege any claim under Section 1. Instead, Count I of his complaint charges, in paragraph 13(6a), an "unreasonable restraint of trade and attempt to monopolize and monopolization of the sale of standard size and quality incandescent light bulbs in the territory serviced by [Detroit Edison], in violation of § 2 of the Sherman Anti-Trust Act . . .". In Count II petitioner alleges that the "requirement" by respondent that customers to whom light bulbs are offered

> pay a rate which includes a charge for light bulbs as a condition of purchasing electric energy service constitutes an illegal 'tie-in' requirement in restraint of trade and commerce in the sale of incandescent light bulbs in violation of § 3 of the Clayton Act.

The relief which petitioner seeks is to have Detroit Edison "temporarily and permanently enjoined from requiring the purchasing of incandescent bulbs in connection with the sale for *(sic)* electric energy. . . ." (7a). Petitioner also seeks treble damages for his alleged class plus reasonable attorney's fees and costs.

Detroit Edison served and filed an answer (21a) to petitioner's complaint denying his allegations and moved for summary judgment (24a). Pursuant to stipulation (48a), only that portion of respondent's motion which relied upon this Court's decision in *Parker* v. *Brown,* 317 U. S. 341 (1943) was presented to the District Court. The District Court granted Detroit Edison's motion with an opinion on July 2, 1974 (56a) and entered judgment for Detroit Edison on August 21, 1974 (60a-61a).

The District Court's opinion was affirmed by the Court of Appeals for the Sixth Circuit on April 23, 1975 in a memorandum opinion which adopted the opinion of the District Court (62a).

B. Detroit Edison

Detroit Edison is a public utility which supplies electricity to over 1.5 million customers in Detroit and southeastern Michigan (3a, 9a-19a, 21a).[4] In 1972, Detroit Edison had 1,573,838 electrical customers and, of these, 1,454,513, or 92%, were residential customers. *Moody's*

4. Detroit Edison and its predecessors have continually engaged in the supply of electricity for illumination to consumers since 1886. Detroit Edison, incorporated in 1903, is the successor to the Edison Illuminating Company of Detroit, incorporated in 1886, and certain other electric utilities that operated in Michigan. *See* R. C. Miller, *Kilowatts at Work: A History of the Detroit Edison Company* 19 *et seq.* (1957); *Moody's Public Utility Manual* 34-36 (1975).

Public Utility Manual 34-36 (1975).[5] Service to residential customers is embodied in Detroit Edison's Domestic Service Rate (41a), while service to commercial and most small industrial customers is reflected in the General Service Rate and the Large General Service Rate (41a, 330a-339a).

C. The Lamp Supply Program

Since 1886, Detroit Edison and its predecessors have provided limited amounts of certain standard size light bulbs to electrical customers without additional charge.[6] New residential customers are provided with light bulbs in "such quantities as may be needed" for all of their permanent fixtures (214a). Thereafter Detroit Edison replaces residential customers' burned out light bulbs (214a) in proportion to their estimated use of electricity for lighting. The customer incurs no direct charge for such light bulbs at the time they are furnished to him. Instead this service is incorporated in Detroit Edison's Domestic Service Rate and General Service Rate which tariffs have been approved by the Michigan Public Service Commission ("MPSC") and its predecessors since 1916 with the lamp supply program specifically set forth.[7] The most recent Domestic

5. Data as to customers is an annual average for 1972, the most recent year for which cost information with respect to the lamp supply program is available in the record. The total population served by Detroit Edison is about 5 million, since several individuals may live in the household represented by a single customer. *Moody's, supra,* at 36.

6. The common light bulb is more technically called a "lamp". *See* R. Taylor *Electricity* 43 (1975). Detroit Edison's program for providing customers with light bulbs is thus referred to as a "lamp supply program."

7. As discussed in greater detail at pages 7 through 8 and page 17 of this brief, respondent makes no direct profit on this service. The cost of the light bulbs to Detroit Edison is simply included as part of the cost of service to customers and is not a part of respondent's rate base (26a-27a, 119a-122a), though certain very limited facilities used, *inter alia,* for distribution of light bulbs do form a part of this base (134a).

Service Rate in the record provides that Detroit Edison supply bulbs in accordance with "Lamp Supply Schedule Designation B-5.5" and that this supply be furnished "[e]ffective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910." (215a)[8]

The lamp supply program is almost universally used by respondent's eligible customers. According to a 1970 survey, approximately 94% of Detroit Edison's residential customers utilize the lamp supply program (301a).[9] The number of light bulbs exchanged annually has increased from 14,557,233 in 1963 to 18,564,381 in 1972 (29a), reflecting the popularity and public awareness of the program.[10] In 1963, the average number of lamps exchanged per customer was 10.09 and in 1972 this figure was 11.17 (29a). The lamp supply program accounts for 50% or less of the incandescent light bulbs distributed in respondent's service area and for only about 23% of light bulbs of all types when fluorescent and high intensity discharge lamps, which are not distributed by Detroit Edison through this program, are included (31a).

Detroit Edison furnishes light bulbs at its 35 customer service centers (9a, 102a-193a, 301a) and also utilizes some 50 agents to distribute bulbs (192a-193a). Respondent

8. Though this is the latest MPSC order in the record, subsequent orders have used the same language. Replacement of burned out light bulbs is also available to commercial customers encompassed in the General Service Rate (217a, 335a).

9. This widespread use distinguishes respondent's lamp supply program from those ordered discontinued because consumer use was small and the programs were thus considered discriminatory. *See Re Hartford Electric Light Co.,* Dkt. No. 10047, P.U.R. 3d, Annual 1962 (1961); *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (n.s.) 517 (1935); *Re Customers of Edison Electric Illuminating Co. of Boston,* 5 P.U.R. (n.s.) 369 (1934).

10. A 1955 survey indicated that the lamp supply program was "the service most desired by the public," of those services furnished by Detroit Edison (292a).

has endeavored to establish its centers in convenient locations (293a-294a). Most of respondent's customers who avail themselves of the lamp supply program obtain their light bulbs at the customer service centers (301a). There are approximately 14 types of bulbs involved in the program (30a) and, as petitioner concedes, these represent the most commonly used sizes. Petitioner's Brief at 4. Physical exchange of burned out bulbs is required to insure that persons inside and outside respondent's service area who do not pay an electric rate embodying the lamp supply program will not avail themselves of the service (196a-199a). This procedure is not burdensome to consumers and the procedure works because the Detroit Edison bulbs are specially designed and distinctively marked. The average customer exchanges bulbs about twice a year (301a).

Detroit Edison procures bulbs for the lamp supply program by a highly competitive process. It designs its own longer-life bulbs and then invites competitive bids from light bulb manufacturers. The successful recent bidders have been General Electric Company, Westinghouse Electric Company and Sylvania Electric Products Company. By competitive procurement Detroit Edison has obtained a higher quality bulb at a lower price than is generally available to customers in the service area through such persons as petitioner.[11] The light bulbs supplied under the lamp program are specially manufactured for Detroit Edison.[12] While bulbs generally available to consumers have an average life of 750 hours, the bulbs used in Detroit Edison's lamp supply program have an average life of 1350 hours

11. The prices bid by each of the three manufacturers from 1969 to 1973 are shown in Exhibits 2 and 3 (194a, 195a). Respondent's cost analysis for the purchase of bulbs for the lamp supply program in 1973 is also in the record (369a-390a).

12. Detroit Edison currently obtains these specially manufactured light bulbs from all three major manufacturers, though, in the past, they had been supplied by General Electric alone (29a).

(33a). The manufacturing process which provides the longer bulb life results in a lumen output approximately 8% less than that of the same wattage bulb generally available to consumers (33a). Detroit Edison fully discloses to consumers the wattage, average bulb life, lumens and the name of the manufacturer on the sleeve of each Detroit Edison light bulb (323a).[13] Detroit Edison receives test reports (363a-368a) from its light bulb suppliers relating to average wattage, lumens, and bulb life every six months based on the manufacturer's continuing testing program (83a). These test results are a factor taken into account in the purchase of bulbs by Detroit Edison (84a). The decision to have bulbs with a longer life specially manufactured for respondent was in response to the fact that customers have frequently requested such bulbs and came after an evaluation of longer life against some loss in lumens (30a).

The cost of the light bulbs used in Detroit Edison's lamp supply program was $2,363,328 in 1972 (37a).[14] Detroit Edison makes no direct profit from the lamp program and

13. This disclosure conforms to the Federal Trade Commission's trade regulation rule for the incandescent lamp industry. 16 C.F.R. § 409.1 (1974). Comparison of the sleeves of 100-watt bulbs furnished by respondent and those available commercially reveals (324a):

	Detroit Edison	Commercial
Watts	100	100
Lumens	1620	1750
Life (in hours)	1350	750

14. This reflects competitive bidding, as well as quantity and cash discounts.

instead recoups only its cost (26a-27a; 119a-122a).[15] In contrast, petitioner's retail light bulb sales yielded him a 50% markup on light bulbs (69a).

The ultimate cost savings to consumers are dramatic. For example, the prices paid by Detroit Edison for 100 watt bulbs ranged from 10.7 cents apiece in 1969 to 11.4 cents apiece in 1973 (194a, 276a-289a); and the total cost, including distribution expenses, was about 15 cents per bulb in 1972. In contrast the wholesale cost of a shorter-lived 100-watt bulb to petitioner in 1972 was 21 cents (80a) which he sold at retail for 32 cents (80,324a)[16] using the retail druggist's traditional 50% mark-up.[17] Thus, once the difference in bulb life is taken into account, the Detroit Edison 100 watt bulbs cost about 15 cents for 1350 hours, while 1350 hours from two of petitioner's 100 watt bulbs would cost about 60 cents. The total benefit to consumers of the Detroit Edison program is shown by the fact that the average consumer who used the program (and virtually all

15. For the last rate case which is reflected in the record, U-4257, which had as its test period the twelve months ending September 30, 1972, Detroit Edison included a direct expense of $2,835,000.00 as the total cost for the lamp program, a figure which contains allocated administrative and general expenses such as the cost of marketing personnel (27a, 36a). The average cost of bulbs in the lamp supply program for 1972 was thus approximately 15 cents including allocated administrative and general expenses ($2,835,000 divided by 18,564,381).

16. The cost to petitioner includes the wholesaler's own mark up. By contrast, Detroit Edison, as volume buyer, deals directly with manufacturers and thereby avoids any extra wholesale cost. The suggested retail price for the 100 watt bulbs petitioner purchased was 64 cents for a package of two (324a). Petitioner does not depart from the suggested retail price and has never had light bulbs "on sale" (67a).

17. As a scholar in this area points out, this 50% mark up has "long been a shibboleth" of retail druggists. J. C. Palamountain, *The Politics of Distribution* 246 (1955).

did), received electric light bulbs for the year 1972 at about $1.80 per consumer.[18]

D. The Regulatory Framework

1. *Background*

The State of Michigan began regulation of electric utilities in 1909, vesting regulatory power in the Michigan Railroad Commission. P.A. 1909, No. 106, §§1-9 in Michigan Complied Laws Annotated ("MCLA") §§460.551-460.559. The Railroad Commission was abolished in 1919 and its functions transferred to the Michigan Public Utilities Commission pursuant to P.A. 1919, No. 419, §3, as amended by P.A. 1925, No. 200, §1 in MCLA §§460.53 and 460.101. That commission was in turn abolished in 1939 and its functions transferred to the Michigan Public Service Commission pursuant to P.A. 1939, No. 3, §4 in MCLA §460.4. An appeal lies from a decision of the Michigan Public Service Commission to the state circuit court and ultimately to the Michigan Supreme Court.

18. This figure was calculated as follows: For 1972 Detroit Edison had an annual average of 1,454,513 residential customers and the lamp program was available to all of them. Additionally the program was available to certain of respondent's commercial customers who represented approximately 95% of Detroit Edison's total commercial customers (41a). For 1972, respondent had an annual average of 117,157 commercial customers (*Moody's Public Utility Manual* (1975) 34-36) or approximately 112,990 to whom the program was available. Thus the total number of customers to whom the lamp supply program was available in 1972 was 1,567,503. The cost per customer equals $2,835,000 divided by 1,567,503 or approximately $1.80. The current annual cost of the lamp supply program is about $2.00 per customer. *See* N.Y. Times, Nov. 30, 1975, §3 (Business and Finance) at 15. Detroit Edison's lamp supply program is thus quite different from that discontinued in *Consumer's Sanitary Coffee & Butter Stores* v. *Illinois Commerce Commission*, 348 Ill. 615, 181 N.E. 411 (1932), cited by petitioner (Petitioner's Brief at 30), where the utility's provision of light bulbs cost the consumer far more than purchasing them commercially and the bulbs offered were apparently no better than those available commercially.

2. *The Relationship between State Regulation and Municipal Franchises*

Detroit Edison provides electricity pursuant to franchises from various municipalities (53a). None of these franchises establishes rates for electrical services nor do they confer upon the respective municipalities any power to regulate Detroit Edison's rates (54a-55a)[19]. Instead, that power rests exclusively with the MPSC.

3. *Pervasive Regulation by the MPSC*

MCLA §460.6 vests the MPSC with "complete power and jurisdiction to regulate all public utilities in the State . . ." and with power and jurisdiction

> to regulate all rates, fares, fees, charges, *services,* rules, *conditions of service* and all other matters pertaining to the formation, operation or direction of such public utilities. (Emphasis supplied.)

19. Since 1950 all of Detroit Edison's franchises have contained uniform language (54a) that:

> Sec. 3. In consideration of the granting of this franchise, Grantee agrees that its rates and charges for electric service in the (city) of (name of city) shall not exceed its rates and charges for like service elsewhere in its service area, evidenced by its uniform rate schedules at the time on file with and approved by the Michigan Public Service Commission.

Moreover franchises enacted since 1961 have, in addition, contained the following language (54a-55a):

> It is understood that the grantee is subject to regulation by the Michigan Public Service Commission, and that any order, rule or regulation by that Commission or its successor, will prevail over any regulation herein contained or provided for in case of conflict.

Furthermore, some franchises secured or received prior to 1950 did contain a provision requiring rates and charges to be the same as in effect in Detroit, but since 1913 all rates, charges and conditions of service in Detroit have been duly authorized by the Michigan Public Service Commission (55a).

Furthermore, under MCLA §460.6 the MPSC is empowered

> to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including *electric light* and power companies . . . (Emphasis supplied.)

The MPSC consists of three members appointed by the governor for six year terms with the advice and consent of the State Senate. MCLA §460.1. By law no member can be "pecuniarily interested" in any public utility subject to the MPSC's jurisdiction or be retained or employed by any such public utility during his tenure. MCLA §460.1.

The heart of the MPSC's function is to regulate the "furnishing . . . [of] electricity for the production of light, heat, or power . . ." (MCLA § 460.501) in such a way as to insure that the public receives such service at the lowest cost. The Commission recently stressed this obligation to provide service to the public at the lowest possible cost in an opinion and order Adopting Standard Rate Application Filing Forms and Instructions, Case No. U-4771 at 1 (1975) (32b).[20] To this end, the law requires the MPSC to give due regard to the "cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of the service to the consumer . . ." in setting rates. MCLA §460.557.

The statute is very specific on the procedures to be followed in setting rates; and it thus makes clear that the utility cannot increase its rates directly or increase the rates indirectly by reducing service without the specific approval of the Commission. MCLA §460.6a. Notice must

20. This fact and subsequent information with respect to proceedings and orders by the MPSC are properly subject to judicial notice by this Court. *See,* e.g., *Nader* v. *Allegheny Airlines, Inc.,* 512 F.2d 527 (D. C. Cir. 1975); *Washington Gas Light Co.* v. *Baker,* 195 F.2d 29 (D. C. Cir. 1951). Copies of pertinent pages from the MPSC's proceeding and orders are included in the appendix to this brief; all references to that appendix are thus: (1b)

be given throughout the service area to insure that all potentially interested parties can appear, and specific evidentiary requirements are imposed which include an investigation and report by the MPSC's technical staff. Full and complete hearings are required prior to any alteration of rates, charges or services which would result in a rate increase or decrease. Formal hearings can be dispensed with only where proposed changes in rate schedules will result in no change in the cost of service tc customers. Thus increases or decreases require full consideration by the Commission. Moreover, rate cases are not an infrequent formality but rather have been an almost annual event over the past five years. See U-4257 filed in 1972 (*Re The Detroit Edison Company,* 3 P.U.R. 4th 209 (1974)), U-3910 filed in 1971 (*Re The Detroit Edison Company,* 94 P.U.R. 3d 298 (1972)), U-3697 filed in 1970 (*Re The Detroit Edison Company,* 88 P.U.R. 3d 68 (1970)). Respondent's last two rate hearings before the MPSC were U-4570, which was filed in 1974, and U-4807, which was filed in 1975. The MPSC audits the books of Detroit Edison for rate case purposes. To perform these audits the MPSC may send four men to the company for a period of four or five weeks. They review all of the expenses on the Company books (125a). These audits specifically include review of all facts of the company's operation and are very wide-ranged in nature (127a). The MPSC has on many occasions reviewed Detroit Edison's customer service programs including the lamp supply program (129a). These reviews are conducted for rate case purposes (129a).

These hearings are careful and detailed. They involve lengthy proceedings in which numerous intervenors take part and in which Detroit Edison's presentation is subject to extensive cross-examination. Rate cases in which Detroit Edison has been involved have varied from seven months to approximately 21 months (130a). For example,

in U-4570 there were 64 days of hearings, comprising some 7500 pages of testimony, with approximately half of those days devoted to cross-examination (34b-40b) of Detroit Edison's witnesses. For U-4807 there were 16 intervenors, including the Michigan State Attorney General, the Michigan State United Auto Workers Community Action Program Council, the Michigan Energy Users Group, the Environmental Defense Fund, and the Public Interest Research Group in Michigan (29b-31b).[21]

The hearings before the MPSC are taken up with objections by agency staff, various intervenors, and other witnesses to the inclusion of expenses and to the inclusion of items in the rate base (131a). When respondent submits proposed adjustments its officials are cross-examined by the MPSC staff and intervenors on any items which they find questionable. The MPSC staff and intervenors submit proposed adjustments on which they are cross-examined by other parties (131a). As a result of objections and statements of intervenors items of expense are excluded from time to time by the MPSC (131a). The rate hearing does more than just determine rates, it determines the rules and regulations under which respondent must provide service pursuant to the rates (136a).

E. Regulatory Sanction for the Lamp Supply Program

The costs of Detroit Edison's lamp program are a regulated component of cost in respondent's rates for electrical services for customers to whom the lamp supply program is available. The ultimate rates embodying this regulated component of cost are affirmatively approved and ordered into effect by the Michigan Public Service Commission.

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21. The right of an interested party to intervene in MPSC rate hearings is established in MCLA §460.6a and the procedure implementing this right is set forth in Michigan Administrative Code (1968 Supp.), R. 460.21-R. 460.27.

Disclosure of the expenses of the lamp supply program to the MPSC is made pursuant to MPSC required accounting procedures. This is currently done under the applicable uniform system of accounts promulgated by the Federal Power Commission which, since 1937, has required the expenses of this program to be set forth under Customer Installation Expense (39a).[22] This accounting is also required under the pertinent regulations of the Michigan Public Service Commission. *See* Michigan Administrative Code (1960 Supp.), R. 460.3587-Account #587 Customer Installation Expenses.

22. This accounting background is set forth in respondent's answers to interrogatories (39a-40a):

Interrogatory #12: Please state the reason why the light bulb expense is included under the caption, "customer installation expense" (this is believed to be account number 587) in rate filings made by Edison?

Answer: FPC—Customer Installation Expenses

"This account shall include the cost of labor, materials used and expenses incurred in work on customer installations in inspecting premises and in rendering services to customers of the nature of those indicated by the list of items hereunder,"

Labor:

Item 5—Installing, removing, renewing and changing lamps and fuses.

Material and Expenses:

Item II—Lamp and fuse renewals.

All accounting procedures are set up pursuant to procedures established and required by the Federal Power Commission. The foregoing is taken from FPC directions.

(a) For how many years was the light bulb program expense carried under the heading "customer installation expense"?

Answer: Since the inception of the above indicated classification of accounts by the FPC in 1937—36 years.

(b) Please state the name and dates of all previous accounts under which the expenses of the light bulb program was included in rate filing?

Answer: All of the accounts are Customer Installation expenses.

1961—to date	587	FPC Classification
1937—1960	762.2	FPC Classification
Prior to 1937	44 B1	DE Classification

While Detroit Edison's lamp supply program antedates regulation, respondent or its predecessors have regularly filed tariffs setting forth the lamp program with the appropriate state regulatory body. Detroit Edison's first such filing on its own behalf was in 1916 (269a). The filed tariffs conform to those ordered into effect by the MPSC in an opinion and order at the conclusion of a rate hearing (140a). The most recent tariff in the record is that for 1972 and represents the tariff ordered into effect by U-3910 (214a);[23] this makes the lamp supply program "effective on service rendered on and after August 19, 1972 . . ." (214a).[24]

One instance where the MPSC specifically considered the lamp program was in 1964, when Detroit Edison proposed to eliminate it for large commercial customers as part of a general *reduction* of rates to such customers in Rate Case No. U-1791 (332a-340a), on the ground that large commercial users could obtain fluorescent lamps, which were not covered by the program, to meet their specialized needs.

23. The MPSC's opinion and order in U-3910 is reported in 94 P.U.R.3d 298 (1972) and incorporates respondent's rates as part of the order. 94 P.U.R.3d at 306.

24. Previous tariffs conforming to those ordered into effect by the MPSC which contain the lamp supply program as a component of the service rate mandated also appear in the record. These put the lamp supply program in effect "under authority of Order of the Michigan Public Service Commission dated December 21, 1970, in Case U-3697" (227a), under authority of Order of the Michigan Public Service Commission dated May 4, 1967 in Case U-2731" (231a); "under authority of Order of the Michigan Public Service Commission dated November 4, 1965, in Case U-2139" (237a); and "under authority of Order of the Michigan Public Service Commission dated May 8, 1951" (241a). Similar tariffs under Order of the Commission or its predecessors appear in the record for 1949, 1947, 1946, 1943, 1941, 1940, 1938, 1936, 1929, 1924, 1920, 1918, and 1916 (242a-269a). The Order of the Commission which currently requires the lamp supply program was issued in U-4570 on February 3, 1975 (46b-52b).

The Commission's final order on the new rate structure made clear that it was

> Without prejudice to the power of this Commission at any time *on its own motion* or *on petition of any interested party* to inquire into and investigate the *rates, charges, practices and services* hereby approved.
>
> The Commission specifically *reserves jurisdiction of the matters herein contained* and the authority to issue such further order or orders as the facts and circumstances may require (339a). (Emphasis supplied.)

This proceeding also put into effect respondent's Domestic Service Rate which continued the services of the lamp program as to residential customers and the General Service Rate which continued the program for small commercial customers.

In short, in 1964 the Michigan Public Service Commission, after having, in its own words, "carefully considered the matter before it" (334a) clearly put into effect rates embodying the lamp program and specifically exercised its authority over the lamp program as well as expressly retaining jurisdiction over this "practice and service".

At the hearing on respondent's motion for summary judgment, Detroit Edison made an offer to the District Court of additional testimony[25] on the MPSC's scrutiny of the lamp program (170a-173a), an offer to which petitioner's counsel took strong objection (173a). This testimony would have indicated extensive consideration of the lamp supply program by the MPSC (170a) as well as the witness's own recommendation that the program be dis-

25. Respondent's subpoena to Kenneth Croy, then supervisor of the Electric Section at the MPSC's Public Utility Division (173a) is included in the record (380a).

continued, which was rejected at the staff level of the MPSC (170a).[26]

Regulation by the Michigan Public Service Commission allows Detroit Edison no direct profit on its provision of light bulbs. The only profit Detroit Edison makes, as a regulated public utility, is the rate of return allowed by the Michigan Public Service Commission on its rate base which is composed of net plant plus an allowance for working capital (97a). This rate base would, obviously, not include the main component of cost for the lamp program which is the cost of the light bulbs themselves. Detroit Edison's investment in customer centers where, among many other activities, light bulbs are distributed, is, of course, included in the rate base but elimination of the light bulb exchange program would not cause a reduction in the investment at these locations (27a, 134a). Detroit Edison's present allowed rate of return under Rate Case U-4570 is 8.57% (41b).

The lamp supply program has not been challenged by any intervenor in any rate case (132a). Additionally, the program has not been the subject of any complaint to the MPSC under MCLA §§460.58 and 460.557. Under the regulations of the MPSC implementing this statutory complaint procedure a consumer such as the petitioner could, without need for an attorney, challenge any "alleged unlawful or unreasonable acts, practices or omissions of" Detroit Edison before the MPSC. Michigan Administrative Code (1968 Supp.) R. 460.31 et seq. Apparently the only customer dissatisfaction with respondent's lamp supply program is that evinced by petitioner (37a) and he has not chosen to express that dissatisfaction to the MPSC (175a).

26. Another instance of regulatory scrutiny and approval of the lamp program by the MPSC, which does not appear in the record, but which is properly subject to judicial notice by this Court is in the appendix to this brief. This includes the order in Rate Case D-1722 (17b, 19b, 22b) which specifically adverts to the lamp supply program in describing the character of service offered by respondent to residential customers. Also included in the appendix to this brief are excerpts from the proceedings in U-4257 filed in 1972 which indicate regulatory scrutiny and review of the lamp program (1b-12b).

F. The Opinions Below

The District Court's opinion (56a-60a) rested on a finding that respondent had furnished the MPSC

> . . . with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers (59a).

On this basis the Court held that the MPSC's affirmative action "in approving the rate structure and the continuing supervision" of respondent by the MPSC (59a) was state action requiring Detroit Edison to furnish light bulbs and the program was thus not subject to the antitrust laws. Moreover, the District Court rejected petitioner's claim that adequate regulatory scrutiny had not been shown:

> Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition. And certainly the court should not step in when the Commission has not even been approached by plaintiff (60a).

The Court of Appeals for the Sixth Circuit affirmed the District Court in a memorandum opinion which recognized that the decision below followed the applicable precedents

> in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943).

Summary of Argument

Parker v. *Brown,* 317 U. S. 341 (1943) and *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975) both make clear that private conduct required by the command of a state is not subject to the federal antitrust laws. As a necessary corollary to this rule, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961) makes equally clear that a private firm does not incur any liability under the federal antitrust laws for proposing to a state body, that it mandate private conduct which would otherwise violate the antitrust laws.

In the present case, petitioner seeks to impose liability for treble damages under the federal antitrust laws upon a pervasively regulated Michigan public utility for providing a service that is required by state command. This service, one which is very popular with consumers and also saves them a considerable amount of money, is embodied in the tariffs filed by the respondent with the Michigan Public Service Commission. Thus the lamp program is part of the basic electric service rate ordered into effect by the Commission after hearings. Furthermore, under Michigan law respondent cannot discontinue the tariffed practice, thereby indirectly increasing the effective rates to Michigan electric customers, without the express approval of the Commission. In short, the MPSC has commanded respondent to carry out a service contained in an approved tariff and this directive represents precisely the kind of sovereign command contemplated by *Parker* v. *Brown.*

This case is, in substance, quite similar to *Gordon* v. *New York Stock Exchange,* 422 U .S. 659 (1975), where a regulated organization submitted proposals which were then approved by its regulator. In *Gordon* the New York Stock Exchange ("Exchange") had proposed rates to the Securities and Exchange Commission ("SEC"); and the SEC, after some informal hearings, allowed those rates to go into

effect. Under those facts, this Court held that the existence of the SEC's formal authority and its less formal supervision of the rates proposed by the Exchange insulated them from antitrust liability. Yet in *Gordon* there was no command from the SEC to the Exchange that was as clear and binding as that from the MPSC to respondent. Furthermore, the fixed commission rates in *Gordon* were plainly anticompetitive while the challenged practice in this case provides consumers with a desired service at substantial savings. Thus, unlike both *Gordon* and *Goldfarb,* the instant action presents no claim that a government agency lent its imprimatur to private price fixing.

Since it furnished light bulbs pursuant to a command of the state, Detroit Edison should incur no antitrust liability for having proposed to the MPSC a tariff which contains this service. Respondent's presentation of its tariff to the Commission did not involve the submission of deliberately falsified information or any attempt to subvert a state regulatory scheme through corruption or coercive tactics, much less an attempt to deny petitioner or any other interested party access to the MPSC. Hence, this case involves no "sham" resort to a state agency as in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972), but rather a regulated utility's submission of a tariff containing a service that achieves substantial cost savings for consumers.

That respondent's lamp program has worked well and proved beneficial to consumers fully explains the lack of more extensive regulatory scrutiny than appears on the present record. The lamp program has been responsive to consumer demand and has furnished to respondent's customers longer-lived bulbs at prices lower than otherwise available with no direct profit to Detroit Edison. Indeed, no consumer or any other interested party including the

petitioner has challenged this service during a rate hearing before the MPSC or by complaint to the Commission. Rather than abdicating its responsibilities, the MPSC appears to have exercised "informed administrative judgment" in not challenging the program, as the SEC did in *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975).

On the other hand, should petitioner prevail in his attempt to apply the antitrust laws, and especially tie-in rules, in a highly technical way, the end result would be an increase in the cost of electric lighting to Michigan consumers. Such an effect would be plainly inconsistent with Michigan's regulation of public utilities which is designed to keep the costs of service as low as possible. State regulation of public utilities has virtually the same goals as the results achieved under competition, namely, the provision of service in response to customer demand at the lowest possible cost. Thus there is no inherent conflict between such regulation and the antitrust laws. Operation of Detroit Edison's lamp program manifests a regulatory purpose in harmony with the antitrust laws since it has provided customers with a desired service at lower prices than otherwise available.

The District Court rightly dismissed the complaint on the alternative ground that petitioner had deliberately declined to invoke the normal procedures which the MPSC had available to deal with the practice that he now challenges in this action.

To require the antitrust treble damage plaintiff challenging a state commission-approved action first to invoke the normal procedures available under state law will tend to assure that any antitrust case ultimately tried will not be burdened by novel, unresolved issues of state law or difficult questions of whether the state has in fact commanded the conduct in question.

This not only serves to make the federal judicial process more effective, but also serves the broader interest of assuring that the state authorities, who are responsible for the overall scheme, have the first opportunity to correct any deficiency. Such a prior resort to the proper state forum assures the regulated defendant that he will not have unwarranted treble damage recoveries visited upon him even where he has reasonably relied on the state regulator's approval. Prior resort, in this case, also assures that consumer interests which would be adversely affected by petitioner's claim will have a chance to be heard in a forum charged with protecting their interest.

Such a pragmatic type of approach was adopted by this court in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), where a federal regulatory scheme was at issue. It is even more appropriate where a state scheme is challenged, because in these circumstances an antitrust case necessarily infringes on an area with which the states have fundamental responsibility in our federal system, and the federal courts necessarily have less expertise. If the petitioner is allowed to recover treble damages without any prior resort to state processes, then others similarly situated will necessarily be encouraged to follow the same course and the normal state remedies will be short-circuited.

In sum, this Court should insure that the responsible state regulatory agency in fact serves the important function of "establishing a *first* line of defense against those competitive practices that might *later* be the subject of antitrust proceedings." *Gulf States Utilities* v. *Federal Power Commission,* 411 U.S. 747, 760 (1973) (Emphasis supplied).

Argument

I.

Detroit Edison's Lamp Supply Program Is Required by State Legislative Command and Should Not Therefore Be Subject to the Federal Antitrust Laws.

A. A Private Party Does Not Incur Liability under the Federal Antitrust Laws for Obeying the Command of a State.

Parker v. *Brown,* 317 U. S. 341 (1943) protects persons who comply with the command of a state from liability under the federal antitrust laws. In *Parker,* this Court made clear that conduct by private parties which might otherwise violate the antitrust laws was not subject to antitrust liability if "[i]t derived its authority and its efficacy from a legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350. Underlying that conclusion was the Court's recognition that in our federal system an act of Congress should not readily be construed as encroaching upon the legislative command of a state or as subjecting state action to its dictates. *See* H. First, *Private Interest and Public Control: Government Action, the First Amendment and the Sherman Act,* 1975 Utah L. Rev. 9, 42-53 (1975). Thus where the state, "as sovereign imposed the restraint as an act of government," 317 U.S. at 352, the federal antitrust laws do not apply.[27]

27. Most of the lower court decisions which have considered *Parker* refer to it as enunciating an exemption from the antitrust laws for state action when, technically, the holding is one of nonapplicability. *See* P. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 Nw. U.L. Rev. 71 (1974).

Goldfarb v. *Virginia State Bar,* 421 U.S. 773 (1975), decided by this Court only last term, reaffirmed the rule that the antitrust laws do not apply to private conduct undertaken in compliance with the command of a state:

> The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. 421 U.S. at 790.

Thus, even anticompetitive activities which are "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, are not subject to the antitrust laws by virtue of *Parker* v. *Brown.*[28] *See also Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 706-707 (1962).

In *Goldfarb* this Court found that the alleged command *was not* in fact an order from the State as sovereign but action by a merely quasi-public body, the Virginia State Bar, to protect the private economic interests of its members. Moreover, in *Goldfarb* there was no suggestion that the Commonwealth of Virginia, through its Supreme Court, either approved or required adoption of minimum fee

28. Petitioner's reliance upon *Olsen* v. *Smith,* 195 U.S. 332 (1904) (Petitioner's Brief at 20) for the proposition that the *Parker* holding excluded only state officials from the application of the antitrust laws is misplaced. Petitioner misreads the state licensing program involved there as somehow making state officials of the pilots. In fact, they were simply licensed by a state commission, just as doctors or lawyers are today. The pilots in that case enjoyed a status which derived from the state's limitation on entry into the occupation and this Court held that the pilots did not enjoy any illegal monopoly since they were performing their duties pursuant to state authorization. Thus private conduct pursuant to state law was excluded from the application of the antitrust laws.

schedules or even approved the Virginia State Bar Association's ethical opinions on such schedules.[29]

In *Parker,* this Court distinguished two situations which did not apply there and do not apply here. First, the Court said that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. *Northern Securities Co.* v. *United States,* 193 U.S. 197, 332, 344-47 [1904] . . ." 317 U.S. at 351.

Secondly, this Court left open the possibility of a state instrumentality "becoming a participant in a private agreement or combination by others for restraint of trade . . ." 317 U.S. at 351-352. The petitioner does not argue that the second situation applies to this case, although he appears to rely, at least in passing, upon two lower court decisions which deal with whether a governmental instrumentality may be subject to antitrust liability. *See Duke & Co., Inc.* v. *Foerster,* 521 F.2d 1277 (3d Cir. 1975); *Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), cited in Petitioner's Brief at 34 and 19 respectively.

Petitioner does misunderstand the first situation in attempting to apply it to what the MPSC has ordered with respect to the lamp supply program. Where the state

29. As this Court said in *Goldfarb*:

> . . . state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not *direct* either respondent to supply them, or *require* the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court *approves* the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action . . . 421 U.S. at 790-791. (Emphasis supplied)

merely *authorizes* a private party to undertake *voluntary* action and the party voluntarily undertakes that action, antitrust immunity does not necessarily follow. Indeed, *Parker* said nothing more than this, while, at the same time, making clear that private conduct undertaken pursuant to the command of a state was not subject to the antitrust laws. In the present case Detroit Edison is not *voluntarily* complying with the tariff which it has filed, rather Detroit Edison is *compelled* by the State to follow its tariff, as made clear at pages 29-30 of this brief.

Petitioner's misunderstanding is reflected in the decisions upon which he relies. These decisions merely involve situations where the state has authorized private conduct and not compelled it. Thus, in *Northern Securities Company* v. *United States,* 193 U.S. 197 (1904), the government challenged what was, in effect, a merger between two railroads that had been effected under the aegis of a holding company, the Northern Securities Company which was formed pursuant to New Jersey law. The plurality opinion in that case made clear that New Jersey's corporate law, which merely authorized the formation of such a holding company, but certainly did not require it, provided no exemption from antitrust liability. The corporate law of New Jersey was merely a permissive statute which allowed a specific form of business organization and was obviously not designed to mandate specific conduct or provide continuing regulation of the merged railroad.

Schwegmann Brothers v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), also relied upon by petitioner (Petitioner's Brief at 12, 21), does not apply to the facts of this case. *Schwegmann,* which arose prior to the McGuire Act, presented the question of whether the Miller Tydings Act preempted a Louisiana statute which created a cause of action for unfair competition on behalf of a manufacturer against a non-signing retailer who failed to adhere to a fair trade

program. The state law in question did not affirmatively require adherence by nonsigners and the manufacturer was under no obligation to institute suit against nonsigners.[30]

Continental Ore Co. v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), not relied upon by petitioner but cited in the Brief for the United States as *Amicus Curiae* ("Justice Department Brief") at 9, similarly lends no support to the proposition that private conduct compelled by a state is nevertheless subject to antitrust liability. The anticompetitive conduct of the Canadian government's purchasing agent in that case was simply not compelled by the Canadian government, even though the agent was acting in a manner *permitted* under Canadian law.

As a necessary corollary to *Parker,* this Court has also held that a private party incurs no liability under the federal antitrust laws for asking a state government to mandate conduct which might otherwise constitute an antitrust violation. *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 172 (1961). Moreover, this rule also applies to a state administrative agency. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510-511 (1972). The only exception to this rule, annnounced in *California Motor Transport,* is where agency processes are used to block the access of other parties to the agency. Thus *Noerr, Pennington,* and *California Motor Transport* evince a strong commitment to the proposition

30. Petitioner's confusion derives from a misreading of certain dicta in the plurality opinion in *Schwegmann.* This language states: "Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U.S. at 389. To read this dicta for the proposition that private conduct compelled by a state is nevertheless subject to the federal antitrust laws, as petitioner does (Petitioner's Brief at 22), not only flies in the face of this Court's holdings in *Goldfarb* and *Parker* but also interprets the quoted language without regard to the facts in *Schwegmann,* where no state command was present.

that interested parties should have full access to government agencies and should be free to propose to such agencies a possible course of action that might otherwise run afoul of the antitrust laws because the agency represents the ultimate safeguard of the public interest.

This reasoning is particularly appropriate in the context of public utility regulation by a state agency. Public utility regulation involves a unique interaction between government and the private sector with ultimate responsibility lodged in the state to determine and set rates and services. Nevertheless the state is ultimately dependent upon initiatives from the regulated utility itself to propose such rates and services. *See* 1 A.E. Kahn, *The Economics of Regulation: Principles and Institutions* 20-57 (1970); C.F. Phillips, Jr., *The Economics of Regulation* 123-142 (1969). While this Court has recognized in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) that not every act[31] of a regulated utility should be considered an act of the state, nevertheless where a state commission approves a utility's proposed tariff and commands the provision of service in accordance with the tariff this creates a situation wholly different from unregulated private business. State action then exists by virtue of the commission's having "put its own weight on the side of the proposed practice by ordering it." 419 U.S. at 357. The implications of *Jackson* in this respect are discussed more fully at pages 38-39 of this brief.

In summary, Detroit Edison, like any other public utility is immune from antitrust liability, under *Noerr,* for submitting proposed tariffs to the MPSC. If these tariffs are then ordered into effect by the MPSC, the utility is protected by *Parker* from antitrust liability for furnishing the service commanded.

31. The issue in the present case is not whether Detroit Edison's tariff is the act of the State of Michigan, but whether the state has compelled Detroit Edison to adhere to its tariff, as discussed in greater detail at pages 38-39 of this brief.

B. Detroit Edison's Lamp Supply Program Is Required by a Continuing State Command.

Detroit Edison cannot unilaterally abandon its program of furnishing light bulbs without extra charge. It cannot simply supply light bulbs to some residential customers and refuse to supply them to others. Rather the lamp program is part of its tariffed service and it must offer that service to all eligible customers at the present rates so long as the tariff, and the MPSC's order approving the tariff, remain in force. In sum, Detroit Edison is not an ordinary business which can voluntarily change its terms of dealing, or simply refuse to deal. *Cf. United States* v. *Colgate & Co.,* 250 U.S. 300 (1919). Rather Detroit Edison is a regulated public utility subject to an effective command of the State of Michigan with respect to its tariffed service. This truth is obvious and fundamental, yet petitioner chooses to ignore it.

Quite simply, Detroit Edison's electricity rates, approved by the MPSC, embody the cost of the lamp supply program as a condition of service. Any unilateral abandonment of the lamp program would amount to a *de facto* rate increase to its customers. The customers would be paying the same rate for less service. In other words, they would be paying for light bulbs but no longer receiving them.

Not surprisingly, Michigan law plainly bars Detroit Edison from unilaterally instituting such a *de facto* rate increase. MCLA §460.6a. The present rates were put into force, as required by statute, pursuant to the "affirmative action" of the Michigan Public Service Commission. Furthermore, "[i]n fixing rates the commission acts in a legislative capacity; and an order of the commission establishing a utility rate must be construed as a statute of like character would be construed." *Michigan Bell Telephone Co.,* v. *Michigan Public Service Commission,* 315 Mich. 533, 24

N.W.2d 200, 205 (1946).[32] That command of the state binds Detroit Edison.

In summary, the combined effect of Michigan's public utility statutes as interpreted by the Supreme Court of Michigan is that the MPSC's approval of Detroit Edison's rates which include the cost of providing light bulbs, binds Detroit Edison by a state legislative mandate to continue that program until the MPSC may order otherwise. Unilateral abandonment of the lamp program would violate the MPSC's order putting the tariff containing the lamp program into effect and might subject respondent to possible criminal penalties, under MCLA §460.558, for willful failure to comply with an MPSC order just as deviation from the marketing plan in *Parker* would have imposed similar penalties upon producers. 317 U.S. at 347.

As outlined in *Goldfarb,* the instant action thus presents an instance where the conduct complained of is "compelled by the direction of the State acting as a sovereign." 421 U.S. at 791. Contrary to contentions by the Justice Department (Justice Department Brief at 10), Detroit Edison's lamp supply program is not a "wholly voluntary practice" but one which has been ordered into effect by the MPSC. The Justice Department appears to have accepted uncritically petitioner's statement of facts without reference to the orders of the MPSC or its predecessors which have been in effect without interruption since 1916 (269a).

32. The specific powers of the MPSC derive, in part, from the powers originally accorded the Michigan Railroad Commission (MCLA §460.551 et seq.) which powers, in turn, were transferred to the Michigan Public Utilities Commission upon abolition of the Railroad Commission (MCLA §460.53) and then to the MPSC upon abolition of the Public Utilities Commission (MCLA §460.4). The power over rates vested in the Railroad Commission (MCLA §460.552) and transferred ultimately to the MPSC stated that "... no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing *the affirmative action of the commission* approving said rate or charge." (Emphasis supplied).

C. Respondent's Situation Is Generally Similar to That in *Parker* v. *Brown* and *Gordon* v. *New York Stock Exchange.*

The facts of the present case are, in substance, similar to the situations presented in the leading antitrust cases involving state and federal regulation of private bodies. *Parker* v. *Brown* involved what was, in essence, a quite familiar situation, namely a private group or firm proposing a particular course of action which might restrain competition and the government's ordering this program into effect after an appropriate consideration. Similarly, this Court's very recent decision in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975) involved fixed commission rates being proposed by a private body, the New York Stock Exchange, and accepted by a government regulator, the SEC, after what this Court found to be appropriate inquiry. In each case the antitrust claim was rejected after a considered look at a regulatory scheme.

Both cases would appear to rest upon a sound principle of public policy, namely that it is essentially unfair to impose antitrust treble damages upon conduct, even very anticompetitive conduct, which is within the scope of legislation authorizing it and which has been considered and approved by the appropriate regulatory body. To do so in the present case, where an unequivocal command of government is combined with substantial consumer benefits, would be to compound the unfairness implicitly condemned in both *Parker* and *Gordon.*

This broad parallel between *Parker* and *Gordon* emerges from even a cursory analysis of the two cases. Unfortunately, petitioner misreads *Parker* and ignores *Gordon.* The Department of Justice, without any analysis of the Michigan statutory scheme, simply accepts petitioner's characterization of the MPSC's authority.

1. *Parker* v. *Brown* Rejected Federal Antitrust Liability for Marketing Schemes Proposed by Agricultural Producers and Approved by the State.

Parker dealt with an attempt to stabilize the price for California's raisin crop which then represented one half of the world raisin crop. The program for stabilizing raisin prices was instituted under the California Agricultural Prorate Act which authorized the establishment of programs for marketing agricultural products under an explicitly anticompetitive standard: "so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." 317 U.S. at 346. Furthermore, the Agricultural Prorate Act's stated purpose was to conserve California's agricultural wealth and prevent "economic waste." 317 U.S. at 346.

Private initiative and involvement in developing a marketing plan constituted a basic, fundamental feature of the California Act. Thus the marketing program had its genesis in a petition by ten producers to the Agricultural Prorate Advisory Commission[33] to have the Director of Agriculture, an ex officio member of the Advisory Commission, select a marketing program committee from among nominees chosen by qualified producers within the zone affected. That committee of private persons formulated a proration marketing program which became effective under the statute when (i) approved by the Advisory Commission and (ii) ratified by 65% of the raisin producers in

33. In contrast to the MPSC, the Advisory Commission was no impartial public body consisting of disinterested citizens. Instead, four of its members were required to be engaged in the production of agricultural commodities, one was required to be an experienced commercial handler of agricultural products, one an experienced cooperative marketing handler of agricultural products, two were to represent consumers generally and one was to represent consumers of agricultural commodities for processing services. Law of June 3, 1933, ch. 754, §3, [1933] Calif. Stats. 1970-1971 (repealed 1967).

the zone owning 51% of acreage devoted to raisin production.

The marketing program was complex but its purpose was plain. Among other things, it provided that at least 50% of the entire crop go into a stabilization pool. Through this method of withholding a substantial part of the raisin crop from the market, the price of the product was maintained at a higher level than under normal competitive conditions.

In short, the agricultural program in *Parker* had definite adverse effects upon consumers. Indeed as this Court indicated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 143 (1969) what California was doing was "maximizing the financial return to an industry" within its borders at the expense of distributors outside the state and consumers both inside and outside the state. Under those circumstances some more elaborate procedures to approve and implement the program were necessary than in the present case where the benefit to consumers is apparent, as pointed out in part II of this brief.

This Court upheld the privately initiated program under the antitrust laws, despite its plainly anticompetitive purpose and effect, because it was put into effect by the legislative command of the state.

Petitioner has misunderstood this Court's holding in *Parker* due to an apparent failure to comprehend the facts of that case. In *Parker,* the State of California was clearly *not* the initiator and actor in pursuit of state business (Petitioner's Brief at 19); rather, those initiatives to establish a particular program came from the producers themselves and it was their business as producers which benefitted from stabilization of prices. Contrary to petitioner's contentions, this Court *did* address itself to the question of when the acts of private enterprise taken pursuant to state authorization or approval are not subject to the antitrust laws. The Court squarely held that the Prorate Program

in question, which had its origins in private initiatives, nevertheless was not subject to the antitrust laws because those initiatives were approved by the state and derived their efficacy from the state's legislative command. In short, under *Parker* even private conduct which does not benefit consumers but which is authorized, approved and made mandatory by the state constitutes state action which is not subject to the antitrust laws.

2. *Gordon* v. *New York Stock Exchange* Rejected Federal Antitrust Liability for Fixed Commission Rates That Were Privately Proposed and Accepted by Government.

Last Term, this Court unanimously rejected an antitrust challenge to the New York Stock Exchange's long maintained and recently much controverted system of fixed commission rates. In essence what the Exchange had done in recent years was to propose fixed minimum commission levels to the Securities and Exchange Commission. The SEC then held an inquiry, often quite informal, and generally indicated without any order that it would allow a particular set of rates to go into effect without objection.

Because of high rate levels maintained by the Exchange in recent years the SEC's role has increased as the rates attracted a broad range of criticism from investors and public agencies. Accordingly, the Commission responded by holding more extensive hearings as this Court observed in *Gordon*.

The plaintiff in *Gordon* simply argued that the Stock Exchange was involved in classic price fixing, and that the SEC's oversight was beside the point. Yet this Court unanimously declined to accept that argument.

In fact, the SEC had not used its formal authority over "the fixing of reasonable rates of commission" under Section 19(b)(9) of the Securities Exchange Act of 1934 (15 U.S.C. § 78s(b)(9)). Instead, the SEC had used either

its traditional practice of private negotiation with the Exchange or informal hearings. *See* Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange,* 80 YALE L.J. 811 (1971). Yet the *existence* of the SEC's full power under Section 19(b)(9) combined with its exercise of informal authority led this Court to the conclusion that permitting the "interposition of the antitrust laws . . . would preclude and prevent . . . the operation of the Exchange Act . . ." 422 U.S. at 691. On this basis, the Court rejected all antitrust claims.

The parallel between the general procedure at issue in *Gordon* and that present in the instant case is obvious. Both the Stock Exchange and Detroit Edison have made continuing proposals to a governmental regulator over many years; and in both cases, the governmental body has accepted the proposal.

To the extent there are differences between the two cases, they favor Detroit Edison. First, Detroit Edison has been subject to continuing formal orders of the MPSC and its predecessors since 1916. Second, the Stock Exchange's fixed rates ran strongly counter to important investor interests that the SEC was under a statutory obligation to protect. The fixed rates were also strongly opposed before the SEC by the Department of Justice as well as various other interested parties, including both investors and their representatives. Only when investors and other interested groups demanded it did the SEC depart from its entirely informal procedures and hold less informal hearings. Here there has been no demand from any source whatsoever that the MPSC hold hearings or investigate the lamp supply program. Even if petitioner had made such a demand, there would appear to be no reason to require the MPSC to hold fuller hearings on the lamp supply program, which clearly benefits consumers (see discussion at pages 44-46), than those initially held by the SEC on fixed commission rates, which

clearly did not benefit investors. Third, Detroit Edison is in fact obliged to enforce the rate structure approved and ordered by the MPSC (see pages 29-30 above), while it was not at all clear that the New York Stock Exchange was required by the securities laws to enforce fixed minimum commissions. Even though the Stock Exchange might have unilaterally withdrawn its system of fixed rates, this Court was still unwilling in *Gordon* to impose treble damages for the rate fixing that the Exchange had proposed and that the Exchange's regulator had accepted.

D. The Courts of Appeals Have Consistently Applied *Parker* v. *Brown* To Protect Pervasively Regulated Utilities from Collateral Antitrust Attacks upon Their Rates and Service Offerings. These Decisions Are Sound and Are Fully Consistent with *Jackson* v. *Metropolitan Edison*.

The common principle which emerges from those lower court decisions which have expressly considered *Parker* v. *Brown's* applicability to a pervasively regulated public utility is that such a utility incurs no liability under the federal antitrust laws for providing service as required under a tariff that has been ordered into effect by the appropriate state regulatory body.[34] *See* e.g., *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Business Aides, Inc.* v. *Chesapeake & Potomac Co.*, 480 F.2d 754 (4th Cir. 1973);

34. Both petitioner and the Justice Department rely upon certain lower court decisions applying *Parker* outside the area of public utilities for guidance in this case. Petitioner's Brief at 26-27; Justice Department Brief at 9-10. Such reliance is misplaced for the holdings in those cases are bottomed upon factual situations wholly different from that in the present case. Thus *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970) involved an attempt to subvert a state competitive bidding statute by coercive tactics. Similarly, *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) involved the submission of deliberately falsified information to a state agency.

Gas Light Co. of Columbus v. *Georgia Power*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).[35]

Gas Light Co. of Columbus v. *Georgia Power Co., supra*, upheld a public utility's rate schedules against antitrust attack where the record revealed that the appropriate state regulatory commission had approved those rate schedules and ordered them into effect with modifications after a hearing. More recently in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) the Fifth Circuit rejected what it considered, in effect, to be an antitrust attack upon the defendant's rates for telephone service which allegedly reflected monopolistic practices by its parent American Telephone and Telegraph Co. The Fifth Circuit reasoned:

> Regulation by a governmental body of the rates to be charged by a public utility is a classic example of the *Parker* v. *Brown* exemption. 518 F.2d at 1134.[36]

In affirming the Court of Appeals for the Sixth Circuit in this case, this Court would be applying the consensus

35. The Fourth Circuit's opinion in *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971), dealing with whether a regulated utility's promotional practices can give rise to antitrust liability, might be read as holding that the mere existence of a state regulatory framework also justified the invocation of *Parker* v. *Brown*. *See* Justice Department Brief at 9, n. 1. Respondent, however, does not rely on that argument. The facts of the present case involve a practice which is *required* under a tariff *ordered* into effect by a state commission. Respondent certainly does not mean to suggest that every action by a regulated public utility is beyond the scrutiny of the antitrust laws. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *Otter Tail*, of course, did not involve an antitrust challenge to a utility's provision of service pursuant to a tariff ordered into effect by a state regulatory commission; nor does the present case involve, as did *Otter Tail*, a refusal to deal aimed at excluding a competing utility system.

36. This represents the same position taken by the Justice Department as *amicus curiae* in *Parker* v. *Brown*:

> For example, in the field of public utilities a state can undoubtedly regulate rates without running afoul of the Sherman Act notwithstanding the fact that the rate regulation may embrace interstate commerce. Brief for the United States as *Amicus Curiae* at 64, *Parker* v. *Brown*, 317 U.S. 341 (1943).

among Courts of Appeals which have directly considered *Parker* in the context of state regulation of public utilities. These courts have refused to impose antitrust liability upon a public utility which has obeyed the command of a state in furnishing service pursuant to a tariff ordered into effect by the responsible state agency.[37]

This approach is entirely consistent with *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) despite the Justice Department's assertions to the contrary. *See* Justice Department Brief at 8, 11-12. The issue in the present case is not whether Detroit Edison's tariff is the act of the State of Michigan, but whether the State has compelled Detroit Edison to adhere to its tariff. *Jackson* was a suit pursuant to the Civil Rights Act of 1871 (42 U.S.C. §1983) where the plaintiff alleged deprivation of property without due process of law in violation of the

37. The District Court decisions cited by petitioner and the Justice Department hardly suggest a contrary consensus. *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 298 F. Supp. 1109 (W.D. Pa. 1969) did not even involve a challenge to a practice embodied in approved tariffs. In *Marnell* v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391 (N.D. Calif. 1966), the defendant had been exempted from rate regulation as to the challenged practice. *Chastain* v. *American Telephone and Telegraph Co.*, 5 CCH Trade Reg. Rep. ¶60,519 (D.D.C. 1975) involved a tariff which did not encompass the challenged practice while the tariff in *Macom Products Corp.* v. *American Telephone and Telegraph Co.*, 359 F. Supp. 973 (C.D. Calif. 1973) had not, generally, been acted on by state commissions and the court referred the matter to the primary jurisdiction of the Federal Communications Commission. Both *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 351 F. Supp. 1153 (D. Haw. 1972), *aff'd in part and rev'd in part*, 518 F.2d 913 (9th Cir. 1975) and *United States* v. *Pacific Southwest Airlines*, 358 F. Supp. 1224 (C.D. Calif. 1975), *cert. dismissed*, 414 U.S. 801 (1974) involved acquisitions and not service pursuant to a tariff put into effect by a state commission. As the latter opinion noted, approval of an acquisition does not require its consummation unlike approval of a tariff which requires performance of the service provided in the tariff. 358 F. Supp. at 1228.

Fourteenth Amendment[38] because the defendant public utility terminated service for nonpayment. In rejecting the plaintiff's claim, this Court held that the termination did not constitute state action under the Fourteenth Amendment.[39]

The result in *Jackson* rests upon facts that are quite different from those presented here. Detroit Edison is *required* to supply light bulbs according to a tariff which has been *ordered* into effect by the MPSC. In contrast, Metropolitan Edison was *allowed* to terminate service for nonpayment but was not required to do so. *See Srack* v. *Northern Natural Gas Co.*, 391 F. Supp. 155 (S.D. Iowa 1975) and *Condosta* v. *Vermont Electric Cooperative, Inc.*, 44 U.S.L.W. 2156 (D. Vt. 1975) which recognize the distinction made in *Jackson* between conduct by a utility which the appropriate state regulatory agency requires and conduct which the state agency merely permits. Finally, there was also some question in *Jackson* whether the provision of Metropolitan Edison's tariff allowing termination for delinquency in payment was even required to be filed with the state public utilities commission. Moreover, the tariff became effective 60 days after filing, absent commission disapproval, and did not require the affirmative action of the state commission, as here, in order to go into effect.

38. As Judge Stevens correctly indicated in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 654 *n.* 35 (7th Cir. 1972), *cert. denied*, 409 U.S. 114 (1973) the test of whether the federal antitrust laws apply to a regulated utility's conduct is not necessarily the same as the test for determining whether the Civil Rights Act of 1871 applies to that conduct.

39. As the Court stated:

> It may well be that acts of a heavily regulated public utility with at least something of a governmentally protected monopoly will be more readily found to be "state" acts than will be the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 419 U.S. at 350-351.

II.

The Clear Benefit of Respondent's Lamp Supply Program to Consumers and the Absence of Consumer Objection Make Unnecessary More Detailed Regulatory Review.

Petitioner's repeated concern about the supposed lack of adequate regulatory scrutiny (Petitioner's Brief at 7-9, 23-27) of the lamp program is inconsistent with his own failure either to complain to the MPSC or to adduce any evidence of customer dissatisfaction with that program.[40] Petitioner argues that the MPSC had "virtually no knowledge about the light bulb program" (Petitioner's Brief at 23). Yet, it was petitioner who resisted efforts by Detroit Edison to submit additional testimony from a staff member of the MPSC concerning its supervision of the lamp program (170a-173a). In the absence of a complaint by petitioner or anyone else, the continuing regulatory oversight of the program since 1916 has been fully adequate.

An independent regulatory commission may, of course, have the duty on its own initiative to investigate a clear threat to the public interest in an area within its jurisdiction. *See Gulf States Utilities* v. *Federal Power Commission,* 411 U.S. 747 (1973); *Udall* v. *Federal Power Commission,* 387 U.S. 428 (1967). But a public agency does not have a duty to expend its limited resources in investigating practices which are consistent with its mandate to protect the public interest and which are not questioned by any interested person. Under such circumstances, an agency's "acceptance of [the particular practices] hardly represents abdication of its regulatory responsibilities. Rather . . . it manifests an informed administrative judgment that the [practices] were appropriate." *United States* v. *National*

40. Even petitioner's wife was pleased with the program (71a-72a). As petitioner testified at his deposition: "I just have my own complaint." (73a).

Association of Securities Dealers, Inc., 422 U.S. 694, 728 (1975). To hold otherwise would require a heavily burdened regulatory agency to divert staff and investigative resources from problem areas to areas in which there were no problems.

Thus the adequacy of the MPSC's oversight of the lamp program should be considered in terms of the most efficient use of limited administrative resources. In recent years the MPSC, like other utility commissions, has been faced with the need to evaluate service rates in light of increasing fuel, labor and capital costs as well as increasing environmental problems. The Commission has examined in detail, with full evidentiary hearings, all of the cost components in Detroit Edison's rates.

A. Detroit Edison's Lamp Supply Program Produces Substantial Benefits to Consumers and Is Consistent with the Goals of the Antitrust Laws.

The lamp program has been only one of the cost elements in Detroit Edison's rate structure. It has not required extensive scrutiny by the MPSC for reasons which are clear. First, the lamp program provides substantial cost savings to Detroit Edison's customers who obtain under it longer-lived bulbs at about 50 to 75% less than what the leading manufacturers recommend and the petitioner charges.[41] Second, the effective cost of the lamp program has not increased significantly in recent years in any way comparable to the increases in the other components of Detroit

41. As indicated at pages 6-9 above, respondent furnished longer-lived bulbs in 1972 at approximately 15 cents per bulb in contrast to petitioner's sale of shorter-lived bulbs at 32 cents. Moreover, a consumer would obtain 1350 hours at 15 cents under respondent's program but would have to pay approximately 60 cents to petitioner to get a comparable bulb life since petitioner's bulbs had a life of only 750 hours.

Edison's cost.[42] Finally, no electric consumer or other interested party has asked the MPSC to conduct an inquiry into the lamp program, which, of course, is not surprising in view of the program's popularity with customers (292a, 301a).[43]

In sum, what Detroit Edison has been providing under MPSC orders since 1916 is a lamp program which is inexpensive and widely used. It is squarely in line with Michigan's broad regulatory goal of providing reliable electric lighting service in response to consumer demand at the lowest possible cost. It is also consistent with the broad federal anti-trust goal of assuring "competition based on efficiency." *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 623 (1975). Indeed, the MPSC is faced with no conflict between its regulatory duties and the federal antitrust laws. Its regulatory goal corresponds to the results sought under competition, which the antitrust laws are designed to protect. Petitioner's objective is to protect traditional retailers by denying consumers the economies of mass purchasing of light bulbs on behalf of consumers and to substitute the higher priced, lower quality bulbs he offers.

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42. As indicated at pages 8-9 above, the per customer cost of the lamp program in 1972 was $1.80 while the current cost is $2.00. This represents an annual rate of increase of approximately 3%-4%. By contrast, Detroit Edison's labor and fuel cost has increased at a far greater rate since 1972, despite diligent efforts to keep them down. *See Moody's Public Utility Manual* at 36-37 (1975).

43. Nor has any municipality challenged the program before the MPSC. *See* MCLA §460.54. Petitioner, however, apparently misunderstands the MPSC's investigatory duties under MCLA §460.54 (Petitioner's Brief at 12-13) which requires the MPSC to "make full investigation as to all matters so submitted" by a municipality. Here no such submission by a municipality has been made. The logical inference to be drawn from this fact is that no municipality has any objection to the program.

As the Court of Appeals for the District of Columbia Circuit has made clear:

> it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits. Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other.[44] *Northern Natural Gas Co.* v. *Federal Power Commission,* 399 F.2d 953, 959 (D. C. Cir. 1968).

To summarize, the Detroit Edison lamp program clearly presents a case where federal antitrust policy and state regulatory policy serve the same ends;[45] and the MPSC is

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44. Petitioner has not contended—nor could he—that Detroit Edison has obtained a monopoly profit on its provision of light bulbs. Quite the contrary, Detroit Edison sells at a price which reflects only its direct costs in contrast to petitioner's 50% mark-up. Thus, in fact, the lamp program approximates the long run equilibrium under perfect competition where all profit other than a return on capital is eliminated. See E. Gellhorn, *Introduction to Antitrust Economics,* 1975 DUKE L.J. 1 (1975); E. Mansfield, *Microeconomics* 245 (2d ed 1975). This is important and pertinent here because a key traditional concern of antitrust tie-in theory is that control of one product will be used to create monopoly profits in a second product. *See,* P. Areeda, *Antitrust Analysis* 569 (2d ed. 1974).

45. This Court has repeatedly held that a state regulatory scheme which manifests a policy in harmony with that of an applicable federal statute should not be preempted by the federal enactment. *See,* e.g., *Florida Avocado Growers* v. *Paul,* 373 U.S. 132 (1963); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947). Yet petitioner attempts to achieve just such preemption here by imposing antitrust

entitled to rely on this fact in continuing to order into effect tariffs containing the program. A regulatory agency charged with serving the public interest cannot "close its eyes to facts" indicating an antitrust violation by refusing to hear parties appropriately seeking an antitrust inquiry. *See, e.g., Denver & Rio Grande Western Railroad* v. *United States,* 387 U.S. 485, 492 (1967). But no court has required a regulatory commission to conduct an antitrust inquiry into a practice when no interested party has requested such a hearing and no evident harm to the public is involved.

B. Petitioner's Antitrust Claim Is Adverse to the Public Interest Which the MPSC Has Served in Mandating Respondent's Lamp Supply Program.

Petitioner has offered an unusual and highly technical antitrust theory[46] which, if accepted, would cost Detroit Edison's customers millions of dollars. Elimination of the lamp supply program would deny customers in Detroit Edison's service area the advantages obtained from competitive bidding among the three major light bulb manufacturers. Detroit Edison provides these light bulbs to

liability upon respondent for having acted in conformity with state regulation which was in harmony with the aims of competition. *See* P. E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 NW. U.L. REV. 71 (1971); Comment, *Parker* v. *Brown: A Preemption Analysis,* 84 YALE L.J., 1164 (1975).

46. It is respondent's position that it is offering a single product to customers in the form of electric light service, as ordered by the MPSC. To apply petitioner's notion that this nevertheless constitutes a "tie-in" might, by the same logic, prevent an electric utility from requiring customers to obtain a meter from the utility. Application of petitioner's novel theory to other regulated industries might result in a conclusion that the airlines have tied "free meals" to passenger flights and have thus monopolized the market for airline passenger meals.

consumers at cost while petitioner obtains a 50% mark-up.[47] Indeed, petitioner and the members of his class rigorously adhere to the suggested retail price for light bulbs (70a).[48] Instead of a cost of $2,835,000 for 18.5 million light bulbs, as in 1972, consumers in respondent's service area would be likely to pay nearly $6,000,000,[49] if they purchased the same amount of light bulbs from retailers such as petitioner. In other words, the cost to consumers would increase by more than $3,000,000.

The consumers' loss would be others' gain. Three groups would benefit: First, light bulb manufacturers would no longer engage in hard competitive bidding for Detroit Edison's business;[50] second, the traditional wholesalers who are made redundant by Detroit Edison's direct purchasing from manufacturers; and, third, the petitioner's class of high mark-up retailers. Given the history of competition[51] in the electric light bulb industry, the likely result of petitioner's success would be to make Detroit Edison's retail customers subject to a "rigid price floor" from which they

47. Indeed, the retail druggists which petitioner seeks to represent have historically been staunch supporters of resale price maintenance and were one of the few supporters of "fair trade" during the recent consideration and repeal of this federal enabling legislation by Congress. *See* "Statement of the National Association of Retail Druggists," in *Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess., pt. 1 at 303-308 (1975).

48. Petitioner has testified that all of his light bulb sales were at the manufacturer's pre-ticketed prices and that he never thought of selling at a different price (67a). He also testified that he has never had light bulbs "on sale." (67a) When asked whether he knew of any retailers who sold light bulbs at other than the pre-ticketed price, he answered, "Amongst my friends I don't." (67a)

49. 18.5 million x 32 cents, petitioner's resale price for 100 watt bulbs (324a).

50. This competitive bidding is reflected not only in prices but in the manufacturers' supply of 60% longer-lived bulbs than they offer to the public generally.

51. A. Bright, *The Electric Lamp Industry,* Chs. IX, XI (1972).

could not easily escape.[52] *Cf. Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975).

In short, successful prosecution of petitioner's antitrust theory would result in preserving the interests of high-margin retailers rather than in serving the public's interest in the efficient provision of electric lighting at a low cost. This being so, the MPSC is not "strictly bound by the dictates" of the antitrust laws, for to accept petitioner's antitrust theories would contravene a state goal of "overriding importance," to provide service at the lowest possible cost to consumers. *See Northern Natural Gas, supra* at 961: *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich. 650, 44 N.W. 2d 324 (1950), *aff'd,* 341 U.S. 329 (1951).

What the MPSC has done is accept and order into effect a Detroit Edison program which on its face serves consumers and is consistent with the broad policies of the Federal antitrust laws and Michigan public utility law. The program has been ordered into effect repeatedly, without objection or question from any interested party. Yet petitioner now argues that such regulatory scrutiny was not adequate, on the basis of a technical antitrust theory which has never been raised before the Commission. In so doing, he would impose retrospective treble damages on respondent and prospective higher costs on consumers. Such a result is not only inequitable, it is unsupported by any decision of this Court.

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52. The Department of Justice does not reflect in its brief any of its historic concern about competitive conditions in the light bulb industry. *See United States* v. *General Electric Co.,* 272 U.S. 476 (1926); *United States* v. *General Electric Co.,* 358 F. Supp. 731 (S.D.N.Y. 1973).

III

Petitioner's Failure To Invoke Available State Remedies Should Preclude His Present Action for Treble Damages.

Petitioner seeks antitrust treble damages for a regulated utility's cost-saving practice which was approved by its utility commission. He predicates his theory on inadequate regulatory supervision of the program and/or lack of state commission jurisdiction over it. Yet, he has made no attempt to utilize, let alone exhaust, the available state remedies with regard to the program in question. Instead, he seeks to avoid the well established regulatory procedures and to burden the federal antitrust courts with novel claims under Michigan law which should first be resolved through the MPSC and the courts of Michigan.

This is not the result of accident or oversight as is demonstrated in the following colloquy between plaintiff's counsel and the District Court (175a):

> Mr. Sklar: . . . [I]t may well be theoretically at least, the Michigan Public Service Commission can tell Detroit Edison to avoid including the cost of the light bulbs in its rate base for purposes of determining its rates, but we don't believe that the Michigan Public Service can tell Detroit Edison that it can't sell light bulbs, or that it can't sell tiddly winks, or it can't build a building.
>
> The Court: *Have you tried?*
>
> Mr. Sklar: *No, we have not.* We feel it is an antitrust case, and we're interested in the damages as well as injunctive relief.
>
> The Court: More damages than injunctive relief?
>
> Mr. Sklar: I would say actually certainly the damages takes care of the past, the injunctive takes care of the future.
>
> The Court: Why should we worry about the past? This has been under a state regulatory body, why not just worry about the future [if] it is a bad practice?

> Mr. Sklar: Well, this is a *crucial question* as to whether or not it has been under a state regulatory body. It is our contention that, in fact, it has not been under a state regulatory body. (Emphasis supplied.)

This colloquy clearly forms the basis for the District Court's *Parker* holding that, "[c]ertainly the [antitrust] court should not step in when the Commission has not even been approached by plaintiff." (60a)

Respondent urges this court to affirm that holding and to announce a rule which prevents this plaintiff, and others like him, from short-circuiting the normal remedies available at state law. To do so, would avoid inequitable treble damage recoveries, while providing the public with protection against anticompetitive practices which the state regulator found unwarranted. This would occur in a forum where notice to consumers affected is provided for and the right to consumer intervention is present, rather than in an antitrust court where the battle may be confined to two opposing private parties. At the very least, resort to state remedies may clarify any doubts as to the scope of the state regulator's jurisdiction and help make clear to an antitrust court the answer to Mr. Sklar's "crucial question" —namely "whether or not [the challenged practice] has been under a state regulatory body." (175a) Thus, at the very least, insistence upon "adjudication of that dispute by the Commission promises to be of material aid in resolving the [*Parker* v. *Brown*] immunity question." *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 302 (1973). Stated alternatively, it spares this Court or any other antitrust court from having to resolve without any prior assistance, the types of state law questions raised by petitioner at pages 27-38 of its brief.

A. Adequate State Remedies Were Available to Petitioner.

Petitioner had several courses open to him within the state regulatory process. First, he could have sought discontinuance of the program in the course of the MPSC's rate hearings which have occurred on an almost annual basis. *See* MCLA §460.6a which allows intervention in a rate case by any interested party. Indeed, two such rate hearings, U-4570 and U-4807, took place during the pendency of this action. Here the petitioner's remedy (as his counsel conceded to the District Court) would be to seek an MPSC order to "Detroit Edison to avoid including the cost of the light bulbs in . . . its rates." (175a) Petitioner is free to argue before the MPSC (contrary to our belief) that the lamp program is discriminatory, excessively costly or otherwise contrary to the public interest. If the MPSC were to accept petitioner's position, it could then order the cost of the program excluded from respondent's rates.[53] This would necessarily terminate the program since Detroit Edison would not continue it if it could not recover its costs.

Second, petitioner on his own initiative, could have used the MPSC's complaint procedure under MCLA §§460.58 and 460.557 to obtain relief against the lamp program. That procedure allows a complainant without need of counsel to challenge a utility's "alleged unlawful or unreasonable acts, practices, or omissions..." Mich. Admin. Code (1968 Supp.) R 460.31. The MPSC has broad powers conferred directly and by inheritance from its predecessors, and these are sufficiently broad to give it direct control over Detroit Edison's lamp program even apart from its *de facto* power through the rate process. Thus, the preamble of P.A. 1909 No. 106, which first vested power over electricity in the

53. *See Hartford Electric Light Co., supra; Wisconsin Gas & Electric Co., supra; Customers of Electric Illuminating Co. of Boston, supra,* discussed at page 5 above, where state utility commissions discontinued lamp programs for infrequent use and hence discriminatory effect.

Michigan Railroad Commission, stated that its purpose was "to regulate the charges to be made for electricity so transmitted; to regulate the *rules and conditions of service* under which said electricity shall be furnished . . ." (Emphasis supplied). MCLA §§460.557 and 460.4 empower the MPSC to "establish such rules and conditions of service as shall be just and reasonable." Moreover, in allowing Detroit Edison to discontinue the lamp program as to a class of commercial customers, the MPSC in U-1791 specifically asserted jurisdiction over the program. Indeed, such regulatory power is a necessary concomitant to its authority over a "public utility" engaged in *"furnishing . . . electricity for the production of light, heat or power . . ."* MCLA §460.501 (Emphasis supplied). *Cf. United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

Furthermore, petitioner has pointed to no authority which would prevent the MPSC from considering the competitive impact of the lamp program.[54] This Court has recognized that a responsible regulatory agency "serves the important function of establishing a first line of defense against those competitive practices that might *later* be the subject of antitrust proceedings." *Gulf States Utilities* v. *Federal Power Commission*, 411 U.S. 747, 760 (1973) (Emphasis supplied). *See, e.g., Northern California Power Agency* v. *Public Utilities Commission*, 5 Cal. 3d 370, 486 P.2d 1218 (1971).

B. Petitioner Seeks to Burden Federal Antitrust Courts with Novel State Law Questions Which Could Be Resolved by the MPSC and Its Reviewing Courts.

Having failed to avail himself of state remedies, petitioner now argues that these remedies are not available under

54. In setting rates the MPSC is required to give "due weight to all lawful elements . . ." MCLA §460.557.

Michigan law (Petitioner's Brief at 27-38).[55] While the MPSC has asserted its continuing jurisdiction over the lamp program and this authority has not been challenged in the Michigan courts, petitioner would now have this Court determine what power a state statute has conferred upon a state agency.

We believe petitioner's state law arguments are unsound but will not burden this Court with a lengthy discussion of these issues. Petitioner's argument on the MPSC's jurisdiction rests largely upon *Huron Portland Cement Co.* v. *Michigan Public Service Commission*, 351 Mich. 255, 88 N.W. 2d 492 (1958), where the MPSC itself had *denied* the existence of its claimed authority. The situation is plainly different where the MPSC has asserted jurisdiction, for an administrative agency is generally the best judge of its own powers. *United States* v. *Southwestern Cable Co., supra; Board of Governors of the Federal Reserve Board* v. *Agnew*, 329 U.S. 441 (1947). Moreover, to deny the MPSC's jurisdiction in such circumstances runs counter to Michigan policy. As the Michigan Supreme Court recently made clear a "party aggrieved by the provisions of a tariff," as here, should ordinarily "seek relief by an attack upon those provisions" before the MPSC. *Valentine* v. *Michigan Bell Telephone Co.*, 388 Mich. 19, 26, 199 N.W.2d 182, 185 (1972). *See also Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 328 Mich. 650, 44 N.W.2d 324, 330 (1950), *aff'd*, 341 U.S. 329 (1951) which stated that the Michigan legislature has delegated

55. Petitioner is not wholly consistent on this issue. In the colloquy quoted above, petitioner's counsel conceded "it may well be theoretically at least, the Michigan Public Service Commission can tell Detroit Edison to cease including the cost of the light bulbs in its rate base for the purpose of determining its rates." (175a); yet in his brief petitioner argues in favor of the "MPSC's statutory duty to make full investigation of all matters [submitted]." Petitioner's Brief at 12-13. The latter point is subject to the qualifications indicated at page 42 above.

the power to exclude competition in the public interest to the MPSC.

Petitioner's second novel state law argument to this Court is the claim that "Michigan has delegated its sovereign authority over public utilities to the municipalities . . . ," Petitioner's Brief at 34-38. This argument is equally unsound. Petitioner relies principally on *Detroit Edison Co.* v. *City of Wixom*, 10 Mich. App. 218, 159 N.W. 2d 230 (1968), *rev'd on other grounds*, 382 Mich. 673, 172 N.W. 2d 382 (1969), an intermediate court decision holding that a municipal zoning ordinance took precedence over the MPSC's determination of a right of way. Whatever the extent of their zoning powers, Michigan's municipalities appear to have no power, by enactment, to regulate a utility's provision of service and such power cannot be inferred from their control over streets. Mich. Const. Art. VII, § 29 (1963). *See City of Jackson* v. *Consumer Power Co.*, 312 Mich. 437, N.W.2d 265 (1945); *City of Detroit* v. *Public Utilities Commission*, 288 Mich. 267, 286 N.W. 368 (1939); *City of Niles* v. *Michigan Gas & Electric Co.*, 273 Mich. 255, 262 N.W. 900 (1935); *City of Kalamazoo* v. *Titus*, 208 Mich. 252, 175 N.W. 480 (1919). While municipalities may contract with public utilities for service at specified rates pursuant to the granting of a franchise and thereby exclude MPSC authority over such rates (MCLA §460.54), no such franchised rates govern Detroit Edison.[56]

In sum, petitioner asks this court to resolve his eleventh hour state law arguments in order to reach his federal antitrust claim. While, we believe, these arguments are unsound, a more fundamental point is really at issue: this court should not have to delve into an admittedly complex state regulatory scheme where more expert decision makers are available initially to resolve or at least clarify the problems.

56. All of respondent's franchises granted since 1961 also provide that the franchise is subordinate to an order by the MPSC (54a-55a).

C. Requiring Prior Resort to State Regulatory Procedures Should Clarify Any Unresolved Issues Relating to *Parker* v. *Brown* Immunity and Thereby Reduce the Risk That a Regulated Utility Would Suffer Treble Damage Liability for Reasonable Reliance on State Commission Action.

The District Court dismissed the petitioner's complaint because it found that the MPSC had mandated Detroit Edison's lamp supply program. We believe that this holding should be affirmed for the reasons stated above. The District Court also made what amounts to an alternative holding that, in any event, petitioner's complaint should be dismissed because "the Commission has not even been approached by plaintiff." (60a) That alternative holding should be affirmed even if this Court were not to find a direct state command over the lamp program.

We recognize that the interplay between the antitrust laws and regulation presents a "problem . . . which . . . is recurring," as this Court said in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 299 (1973). That "problem arises when conduct seemingly within the reach of antitrust laws is also at least arguably protected or prohibited by another regulatory statute . . . [which] [o]ften, but not always . . . includes an administrative agency with authority to enforce the major provisions of the statute. . . ." 409 U.S. at 299-300.

In *Ricci*, this Court resolved the recurring problem by requiring the responsible regulatory agency to consider the issues first before the antitrust court proceeded. There the private antitrust plaintiff alleged that he had been deprived of a seat on a regulated commodity exchange in violation of the Sherman Act, as well as the Commodity Exchange Act. This court ordered the Commodity Exchange Commission to consider this dispute first because: "some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Com-

modity Exchange Commission; and . . . adjudication of that dispute by the Commission promises to be of material aid in resolving the [antitrust] immunity question." 409 U.S. at 302. The Court stressed the importance of having such questions "dealt with *in the first instance* by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case." 409 U.S. at 305 (Emphasis supplied). It pointed to "the agency's superiority in gathering the relevant facts and marshaling them into a meaningful pattern [citation omitted]," 409 U.S. at 306. Substantial judicial economies, the Court pointed out, would be effected since "the adjudication of the Commission . . . would eliminate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision." 409 U.S. at 306. Finally, the Court stressed that the prior agency action would help assure a correct disposition of any antitrust case:

> Affording the opportunity for administrative action will "prepare the way, if the [antitrust] litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the [regulatory] statute as applied to [these] particular circumstances." 409 U.S. at 306.

Such a pragmatic approach is even more appropriate where a state regulatory scheme is at issue. Rather than retaining jurisdiction to determine all questions of federal law, as was deemed appropriate in *Ricci*, a federal court should dismiss an antitrust claim when available state remedies have not been utilized and where unresolved questions of state law may remain.

A federal antitrust court cannot be presumed to have any particular expertise with respect to the state scheme and it would necessarily have to look to past state court decisions for authoritative guidance. Where the state law questions are complex, novel, or otherwise difficult, a federal court is essentially left at sea with few wholly reliable aids to chart its course. By contrast, a federal court can more authoritatively determine issues raised under a *federal* regulatory scheme where it is necessary to decide an antitrust case. *See, e.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).[57]

It is, thus, especially appropriate when state regulatory jurisdiction and remedies are involved to insist that the prospective antitrust plaintiff invoke the state remedy prior to initiating an antitrust suit, to "obviate any necessity for the antitrust court to relitigate the issues" and to insure "a more informed and precise determination" by the antitrust court of any recurring immunity question. *See Ricci, supra*, at 306.

If the petitioner were required to invoke the available MPSC remedies, any one of several results might follow. Each possible result would be helpful to an antitrust court faced with a subsequent *Parker* v. *Brown* issue.

First, the MPSC might possibly determine (contrary to our view) that it did not have jurisdiction over the lamp program (as it determined lack of jurisdiction in *Huron Portland Cement Co.* v. *Michigan Public Service Commission, supra*) or a reviewing court might determine that the Commission did not have jurisdiction. Petitioner would then be able to bring his antitrust suit free of *Parker* v. *Brown* issues.[58]

Second, the MPSC might assert jurisdiction but withdraw its approval. If respondent continued the lamp pro-

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57. This is what the Court of Appeals in *Ricci* had done with respect to the issue of the Commodity Exchange Commission's jurisdiction over the matter in question.

58. Of course, the issue of reasonable reliance by the utility on the Commission's jurisdiction might well preclude any retrospective treble damage liability. *See Simpson* v. *Union Oil*, 377 U.S. 13, 24-25 (1964); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1972), discussed below at page 57.

gram without benefit of an order of the MPSC, petitioner would then be free to initiate whatever antitrust claim he might think he has.

A third possibility (and no doubt the possibility that the petitioner fears), is that the MPSC would consider the petitioner's evidence and arguments together with those of respondent and any consumer representatives or other interested parties, and conclude, as it has since 1916, that the program is in the public interest and must be continued. Petitioner would be free to challenge any such decision in the Michigan courts. Such a decision, if affirmed by the reviewing courts of the State of Michigan, would make crystal clear to any subsequent federal antitrust court that which respondent believes is already clear—namely that the lamp program was compelled by the State of Michigan as sovereign and that any antitrust claim is barred by *Parker* v. *Brown*.

Needless to say, any one of these results would materially assist a federal antitrust court in any subsequent suit. More than that, such prior resort would give due regard to the legitimate interest of the state as sovereign in a federal system. If there were remaining antitrust issues they could then be raised in a federal court. *See Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). Following resort to available state remedies, an antitrust "court will be in a much better position to determine whether the antitrust action should go forward." 409 U.S. at 306. In sum, prior resort to the MPSC represents a sound and orderly process of adjudication.

Much more, however, is at stake than just orderly adjudication. Fundamental questions of equity are raised by allowing federal courts to impose a stringent treble damage liability on a regulated utility which has reasonably relied on its submissions before a state regulatory commission.

See Simpson v. *Union Oil Co.*, 377 U.S. 13, 24-25 (1964) and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1972). In *Simpson* this Court said specifically: "We reserve the question whether, *when all the facts are known*, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." (Emphasis supplied.) Similarly, in *Chevron*, this Court stressed that it was important to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect." Quite simply, when treble damages might be imposed against a regulated enterprise for conduct that it fully disclosed to its regulator and the regulator's approval has been obtained, the antitrust court should have the benefit of "all the facts"—all the facts relating to the exact operation of the practice and the exact nature of any reliance by the defendant upon the regulator's approval. The way to assure that this happens is to require the would-be antitrust plaintiff to resort first to the state agency and take advantage of the state "agency's superiority in gathering the relevant facts and marshaling them in a meaningful pattern." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498 (1958), quoted in *Ricci*, 409 U.S. at 306.

D. Allowing Antitrust Treble Damage Recovery Would Discourage Use of Normal State Administrative Processes.

Michigan law requires that where a "party [is] aggrieved by the provisions of a [utility's] tariff," he should ordinarily seek relief by challenging the tariff before the MPSC. *Valentine* v. *Michigan Bell Telephone Co.*, 388 Mich. 19, 26, 199 N.W.2d 182, 185 (1972). This reflects the normal approach of state utility regulation in Michigan and elsewhere, which is generally to provide a system of prospective relief. The MPSC, like other utility commissions, has

a complaint procedure which enables it to order discontinuance of a regulated utility's conduct that the Commission finds to be contrary to the public interest. *See* MCLA §§ 460.58 and 460.557. Such an approach allows the regulated utility to operate in the context of knowing what the rules of the game are and at the same time allows the public or the Commission to secure correction of any utility practice which does not serve the public.

This whole process of orderly state Commission consideration of disputes and prospective correction will clearly be subverted if parties such as the petitioner are allowed to short circuit it entirely by going straight to federal court and obtaining retrospective treble damages. No potential plaintiff would be likely to invoke the state utility regulation scheme of prospective relief if the nearby federal court is going to offer him retrospective treble damages as an alternative. Indeed, the incentive to avoid the normal state forum is one not only of money damages but of litigating tactics. If the potential plaintiff avoids the normal commission remedies, he can, just as petitioner has done here, rely on bare arguments that the utility commission does not have jurisdiction, or has not considered the question, or has not commanded the practice at issue. The federal antitrust laws should simply not allow a would-be plaintiff to deliberately avoid state regulatory procedures and then manipulate any uncertainty about whether a state command existed into a conclusion that such a command was not present.[59]

In sum, no one can deny that an antitrust plaintiff should have his day in court, if, indeed, he has a meritorious antitrust claim; but he should not be encouraged to short-

59. Such a result would, in effect, subject state regulated public utilities to the possibility of conflicting standards of conduct which "must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs." *Hanna* v. *Plumer*, 380 U.S. 460 474 (1965) (Harlan, J., concurring).

circuit the normally available state remedies. Both goals can be accomplished by insisting that the plaintiff first invoke the appropriate state remedy and then proceed with whatever antitrust treble damage claim is still available.

E. Requiring Resort to the Michigan Public Service Commission Would Assure Consideration of the Lamp Program by a Body Which Will Give Notice to Consumers and Consider Their Interest.

Petitioner's antitrust claim consists of the bare technical argument that Detroit Edison is engaged in tying the sale of light bulbs to the supply of electrical power (see pages 2 and 44 above). Petitioner clearly wants this issue resolved, preferably under a *per se* rule, without any regard to the losses that such a victory would impose upon electricity consumers in Michigan. He wants this important consumer issue resolved in an antitrust court simply as a private adversarial dispute between him and Detroit Edison.

Yet this is not just a private dispute. It is a dispute in which Michigan consumers have a $3,000,000 stake (see pages 44-45 above); and the MPSC offers a public forum for assuring that the consumer interest is heard and protected. This agency has a statutory responsibility to protect electricity consumers and has available procedures for giving notice to consumers throughout the utility service area of pending proceedings which affect their interests. When the Commission holds a proceeding, the affected consumers can participate[60] together with the Commission staff to assure that the consumer interest is fully considered and protected. Petitioner may not want this but the public interest requires it.

In sum, where a private antitrust case would have a clear adverse affect on consumer interests in the regulated sector,

60. *See* Mich. Admin. Code (1968 Supp.) R460.21-R460.27. During the pendency of this action, two rate cases, U-4570 and U-4807 took place and petitioner could have intervened in either proceeding.

it is doubly necessary that the underlying question should be aired fully and publicly by the state agency that possesses the capability and the continuing responsibility to consider consumer interests. The fact that such a careful consideration leads to an order in effect barring an antitrust claim on *Parker* v. *Brown* grounds may be unacceptable to the petitioner but it would be more than acceptable to the consuming public.

This point as well as those which precede it all lead to the same conclusion, that the process of orderly regulation of utilities, conservation of federal judicial energies, protection of regulated enterprises against unwarranted treble damages, and protection of consumers can and should be accomplished by requiring the potential antitrust plaintiff who wishes to challenge Commission-approved action, first to invoke available processes of the Commission before instituting a private treble damage action. To do so, is not to bar a future antitrust action if merited, but to assure that those actions will be applied only where they do have true merit and do not interfere with legitimate commands of the state. Such a process is not only more orderly and efficient, but it is more consonant with a federal system of dual sovereignty.

Conclusion

We do not ask this court to give public utilities a carte blanche to violate the antitrust laws in order to serve themselves at the expense of their customers. We do ask that they be allowed to perform their public duty of serving their customers by providing essential services at low costs, under state supervision and direction, without being subject to treble damages for their effort.

Respondent's lamp program involves low cost service to the public and is subject to an effective command of the State of Michigan. Accordingly, *Parker* v. *Brown* precludes

petitioner's suit for treble damages. In any event, that action is premature and should be dismissed because of petitioner's failure to exhaust available state remedies.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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PART 1. DEFINITIONS AND GENERAL PROVISIONS

R 460.11. Definitions.

Rule 1. As used in these rules:

(a) "Applicant" or "petitioner" means a party seeking approval, authority, a certificate of authority or of public convenience and necessity or other certificate, license, permit or exemption or other relief.

(b) "Complainant" means a party who files a complaint.

(c) "Party" to a proceeding before the commission means a person by or against whom a proceeding is commenced, or a person admitted by the commission to intervene in a proceeding pursuant to these rules.

(d) "Person" means an individual, partnership, corporation, association, body politic, or state agency.

(e) "Protestant" means a motor carrier rendering service or applying for authority to render service, likely to compete with the proposed motor carrier service of a motor carrier applicant, if the former carrier opposes the application of the latter carrier.

(f) "Respondent" means a party who is complained against, a party investigated or ordered to show cause, or a utility rendering service of the same sort within a municipality proposed to be served by any other utility.

R 460.13. Applicability and Construction of Rules.

Rule 3. (1) These rules govern practice and procedure in all matters before the public service commission.

(2) These rules shall be liberally construed to secure just, economical and expeditious determination of the issues presented.

R 460.14. INFORMATION, DOCUMENTS AND COMMUNICATIONS.

Rule 4. (1) Information as to established practice or procedure under these rules will be furnished to any person upon application to the secretary of the commission.

(2) Applications and other documents shall be in writing and shall conform to all requirements of these rules. The secretary of the commission, upon reasonable request, will advise as to the form of petition, answer or other papers necessary to be filed in any case and furnish such information from the files of the commission as will aid in a full presentation of material facts.

(3) Documents filed with the Commission shall be printed, typewritten or otherwise mechanically reproduced, shall be upon paper 8½ inches by 11 inches in size, or folded to such size, or on such forms as may be hereafter supplied by the commission.

(4) Communications and documents shall be addressed to the Michigan Public Service Commission, Lewis Cass Building, Lansing, Michigan 48913. Communications and documents so directed are officially received.

R 460.15. SERVICE OF PAPERS.

Rule 5. Notices, petitions, answers and other papers or copies thereof required to be served in a proceeding may be served either personally or by mail; and when a person has appeared by attorney, service upon such attorney is deemed proper service. When a paper is served, the person serving the paper shall file with the commission proof of service, or admission of service by the person served or his attorney, annexed to a copy of the paper served, so that the commission may know that the paper in question has been properly served and the date of the service. When copies of papers are sent to the commission and

served by the commission, the commission will attach to the original of the paper, an affidavit of service signed by the person serving the same. Service on municipalities shall be similarly made on supervisors of townships and on clerks of other municipalities.

R 460.16. PROCEEDINGS; LOCATION, PARTIES.

Rule 6. (1) Sessions of the commission will be held in Lansing or at any other place as the commission may direct at such days and hours as the commission may designate.

(2) Each party to a proceeding shall be known as a complainant, respondent, protestant, intervenor, applicant or petitioner according to the nature of the proceeding and the relationship of such party thereto.

R 460.17. SAME; PARTICIPATION BY COMMISSION STAFF.

Rule 7. The commission staff may appear in any proceeding before the commission and through its witnesses present testimony as to the results of its accounting, engineering and economic investigations, field studies, inspections, other technical investigations and studies. The commission staff in any proceeding may file briefs, make statements of positions, or otherwise upon the record make recommendations, as it believes proper and lawful, based upon the evidence presented.

R 460.18. DECISIONS AND TRANSCRIPTS.

Rule 8. A certified copy of the decision in any proceeding will be furnished free of charge to each party of record. Copies of transcripts and additional copies of decisions shall be furnished at such rates as are in accordance with current rules and regulations and statutes.

R 460.19. Computation of time.

Rule 9. In computing a period of time prescribed or allowed by rules of the commission in which an act is to be performed after a specific date, act or event, the day of the specific date, act or event is not included and the last day of the period is included, except when it is a Saturday, Sunday or legal holiday, the period runs until the end of the next day which is neither a Saturday, Sunday or legal holiday.

PART 2. INTERVENTION

R 460.21. Petitions.

Rule 11. (1) A person not defined herein as a complainant, respondent, protestant, applicant or petitioner, and who claims an interest in a pending proceeding, may petition in the proceeding for leave to intervene. An original and 6 copies of a petition to intervene shall be filed with the commission at least 5 days prior to the date set for hearing, and the petition when filed shall show service of copies thereof upon all parties to the proceeding. A petition to intervene which is not timely filed with the commission shall not be granted by the commission unless the denial of the petition is shown to be detrimental to the public interest or to be likely to result in a miscarriage of justice, and unless all parties, excluding intervenors, have an adequate opportunity to file answers as hereinafter set forth and to be heard with respect thereto. A motor carrier shall comply with the provisions of this rule except as provided in rule 32.

(2) A petition to intervene shall set out clearly and concisely the facts supporting the petitioner's alleged right or interest, the grounds of the proposed intervention, and the

position of the petitioner in the proceeding, so as fully and completely to advise the parties and the commission of the specific issues of fact or law to be raised or controverted.

R 460.22. Answers.

Rule 12. A party, except an intervenor, to a proceeding and the commission staff may file an answer to a timely petition to intervene on or before the date, if any, set for hearing upon the petition or on and before the date set for hearing upon the merits, whichever is earlier. An adequate opportunity to file an answer to a petition to intervene, which is not timely filed, shall be afforded to any such party and the commission staff.

R 460.23. Action by commission.

Rule 13. As soon as practicable after expiration of the time for filing an answer to a petition for intervention, the commission will grant or deny the petition in whole or in part, or if found to be appropriate may authorize limited participation. A person granted leave to intervene in whole or in part is an intervenor and shall be a party to the proceeding. The granting of a petition to intervene in whole or in part is not recognition by the commission that the intervenor may have rights to appeal from any order of the commission entered in that proceeding, except as otherwise provided by law.

R 460.26. Participation Without Petitions for Intervention.

Rule 16. (1) A person may appear in a proceeding before the commission in lieu of a formal petition to intervene, if there is full disclosure of the identity of the person whose appearance is to be entered; the interest of such person in the proceeding and the position intended to be taken are

fully and fairly stated; and the contentions of such person will be reasonably pertinent to the issues already presented and any right to broaden the issues unduly is disclaimed, as follows:

(a) In a proceeding to fix rates or investigate conditions of service of a carrier or utility subject to the jurisdiction of the commission, appearances by individual customers or ratepayers of such carrier or utility or by the duly authorized governmental representatives thereof.

(b) In a proceeding by a railroad company for authority for abandonment of a station or discontinuance or diminution of quantity or quality of service, appearances by other persons in interest.

(2) An appearance under this rule entitles the person to testify or make a statement of his position but he is not regarded as a party to the proceeding.

R 460.27. Same; Appearances.

Rule 17. In a proceeding, other than a motor carrier proceeding, a person entitled to enter an appearance in lieu of filing a formal petition for intervention shall file an original and 6 copies of an appearance with the commission at least 5 days prior to the date of hearing. The appearance shall set out clearly the information required by rule 16 and when filed shall show service of copies thereof upon the applicant, complainant or respondent. A person who does not file the appearance required by this rule is not entitled to a notice of adjournment.

PART 3. COMPLAINTS

R 460.31. Contents and Kinds.

Rule 21. (1) A complaint shall be limited to matters involving alleged unlawful or unreasonable acts, practices

or omissions of a utility or carrier. A complaint may be either formal or informal and may be made by a person having good or sufficient reason therefor or by the commission on its own motion.

(2) An informal complaint shall be in writing and signed by complainant, and contain a concise statement of the facts involved and the name and address of the complainant and the party complained against. The commission will attempt to settle problems arising under an informal complaint without formal action when possible.

R 460.32. Formal Complaints; Copies and Contents.

Rule 22. A formal complaint shall be in writing and an original and 6 copies shall be filed with the commission and as many additional copies as there are parties complained against, and shall contain:

(a) The full name and post office address of the complainant.

(b) The full name and post office address of each respondent.

(c) A full, clear and reasonably certain statement of the alleged unlawful or unreasonable acts, practices or omissions concerning which complaint is made, with reference where practicable to the sections of law, order or rules of which a violation is claimed.

(d) The signature of the complainant and the name and post office address of the complainant and his attorney, if any.

(e) Verification by the complainant. A complaint by an unincorporated association may be verified by any officer or director thereof.

R 460.33. Same; Examination, Dismissal.

Rule 23. Upon the filing of a formal complaint, the commission shall immediately examine it to ascertain whether it states a prima facie case of an unlawful or unreasonable act, practice or omission of a utility or carrier and conforms to these rules. If the commission believes that the complaint does not state a prima facie case or does not conform to these rules, it shall so notify the complainant or his attorney, and opportunity may be given to amend the complaint within a specified time. If the complaint is not so amended within such time, or such extension thereof as the commission for good cause shown may grant, or if the complaint as amended does not state a prima facie case or conform to these rules, it shall be dismissed.

R 460.34. Same; Service of Copies and Notices to Answer.

Rule 24. If the commission believes that the complaint, either as originally filed or as amended, does state a prima facie case and conforms to these rules, the commission shall serve upon each respondent a notice accompanied by a copy of the complaint requiring that the matter complained of be satisfied, or that the complaint be answered, within 20 days from the date of service thereof or within such further time as the commission may fix upon good cause shown. However, if a motion to dismiss a complaint is served as hereinafter permitted, no answer need be made unless the commission denies the motion or postpones its disposition until a hearing on the merits, and in either event the answer shall be made within 20 days after notice to the respondent of the commission's action.

R 460.35. Same; Respondent's Offers of Relief.

Rule 25. If a respondent desires to satisfy the complaint, he may submit to the commission within the time

allowed for the satisfaction or answer, a statement of the relief which he is willing to offer. On the acceptance of this offer by the complainant and approval of the commission, no further proceeding need be taken. If the offer of satisfaction is refused by the complainant, an answer shall be filed by the respondent within 20 days from the receipt by respondent from the commission of notice of the refusal.

R 460.36. Same; Motions to Dismiss and Answers.

Rule 26. The defense that the complainant does not have a good or sufficient reason for making a formal complaint, that the complainant is without standing to make the complaint, or that a formal complaint fails to state a prima facie case or otherwise fails to conform to these rules, may be raised by motion to dismiss or answer at the option of the respondent. All other defenses to the complaint shall be raised by answer. An original and 6 copies of the motion to dismiss or answer, accompained by proof of service of a copy thereof on the complainant shall be filed with the commission. The answer shall contain a specific denial of the material allegations of the complaint controverted by respondent and also a statement of new matters constituting an affirmative defense. If the answering party has no information or belief on the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial upon that ground.

R 460.37. Burdens of Evidence and Proofs.

Rule 27. In a complaint proceeding, the complainant has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant has the burden of proof as to factual allegations relied upon as constituting the basis for the complaint and the respondent has the burden of proof with respect to affirmative defenses.

Excerpts from Proceedings in Case No. U-4257

[3128] *Cross-Examination by Mr. Turner:**

Q. Mr. Kelley, my name is Turner. I am City Attorney for Ferndale, one of the cities that used to have a customer service office.

You are the Assistant Manager of Customer Services, I understand, and I wonder if you could give me the categories of customers that that office serves? A. That my position entails or that office?

Q. No, your work under Mr. Milby. I am talking about that office that Mr. Milby has. What are the categories of customers that are served by that office? A. The functions that come under the Manager of Customer Services would be our customer offices, our appliance repair, our lamp exchange programs within the offices, our fuse work, and all of our field people that go out to do meter work and fuse work, things of this nature, meter reading in the districts—that excludes the City of Detroit—and certain field representatives . . .

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[3413] *Cross Examination of Mr. Kelley Continued*

Q. Is your department responsible for the light bulb service provided by Detroit Edison to its customers? A. Yes, the customer service division of the Marketing Department is responsible for the lamp exchange program that we have.

Q. The Company discontinued some time during 1972 the providing of free 25 watt light bulbs to its customers—did it not? A. Yes, for a very short period.

*The bracketed numbers refer to the page of the proceeding.

Q. Approximately what date in 1972 did that discontinuance take place? A. I think I would have to go to the records, Mr. Anderson.

I believe it was sometime in the early part of the year, [3414] but the date—I can obtain it readily if it is necessary.

Q. Well, that is close enough. You say the early part of the year. Now, the 25 watt lamp was placed back on the exchange list in December of 1972; is that correct? A. It was placed back on the exchange list; again, I am not sure of that particular date.

Q. I show you a response to our question No. 30 to the Company on informal discovery concerning that matter, and that indicates, does it not, that it was December 1972 that the 25 watt lamp came back on to the exchange list? A. Certainly this is what it says in this, yes.

Q. You weren't responsible for answering of the interrogatories or discovery requests? A. Yes, I was.

Q. But not that particular one? A. I was responsible for collecting and putting the answers together that you are discussing, but I did not get into the specific records, but I would assume certainly and I believe the December 1972 is correct, yes.

Q. Why was that lamp put back on the exchange list in December? A. Well, I think we have to go back to really the purpose of the lamp exchange in various sizes. Our purpose really is to meet the needs of the customers and what they request, [3415] and I believe the figures showed the volume was going down relative to total exchange, and it was felt that the 25 watt lamp did not serve as much of a purpose as it did in the past and it was discontinued. However, I think we were wrong in our judgment, that we did have a fair number of people that did request it, that they were using them in multiple fixtures, this type of thing, and we did reinstitute it based on feelings that the customer was using the 25 watt and still needed it and so we reinstituted it.

Q. During 1972 you also discontinued the 50-150 watt lamp from your list of exchange lamps, did you not? A. This is correct.

Q. When did that occur? A. I believe at the same time as the 25 watt. Again, I do not have the exact date.

Q. A 50-150 watt bulb is a three-way bulb, is it? A. This is correct. It is actually a 50, 100, 150 of the three wattages.

Q. Was that burned with the socket down or the socket on top? A. That would burn with the socket down as a typical lamp or used in a typical table lamp, three-way table lamp.

[3416] Q. Now, you intend to restore that lamp to the exchange list as soon as another shipment of bulbs comes in from the manufacturer; is that correct? A. Yes, that is correct.

Q. Has that shipment come in yet? A. I would have to check. I am not sure. Very possibly it has. The manufacturer of the lamps gives us pretty good service.

Q. Why was that lamp discontinued during 1972? A. Again, the manufacturers have come out with the 50-250 lamp, and the number of exchanges in the 50-150 has been dropping off, and we felt again that the other three-way lamp would be taking its place.

However, there are lamps of the manufacturers that cannot accept the 50-250 and, therefore, again, it was felt that this was dropping and it could be eliminated.

So we were not aware of the fact of this situation, so we are bringing it back also, because the 50-250 will not fit in certain lamps.

Q. When you discontinued the 50-150, then the smallest three-way bulb that you had for exchange was the 50-250,

wasn't it? A. Yes. Again, that is a three-way that would burn 50, 200, [3417] 250.

Q. Yes. And wasn't the effect of that change to bring about more electric usage by Edison's customers? A. No, I don't think so.

Q. Well, if a man can't replace his 50-150 in his table lamp at home with the same bulb, but has to use a 50-250, he's going to burn considerably more electricity, isn't he? A. For which purpose, now?

Q. For lighting his chair while he reads the newspaper. A. Well, if he wants it for lighting while he reads, what wattage should we presume that he has it on in a three-way bulb?

Q. I would think it wouldn't matter. Wouldn't the answer be the same, unless he was using it at the 50 watt level?

A. The thing I'm getting at is that you could put a 100 watt in it or you could put a 150 watt in it. If that was the case—the purpose of the high wattage in the first place is to enable you to do a better job of reading, because that is the task that you have at hand. Now, the 50-watt is the same in either case. If you're using it for a night light or just to get some light into the room to move around in it, then they are both the same. But if you want it for reading, readings newspapers [3418] and this type of seeing task, my offhand opinion would be that a 200 watt would do a better job for you than a 150 or a 100. I am going to ask again, why would you switch it to a 100 and a 150 if you need more light to read by?

Examiner Sullivan: But the result would be, if you use the 250 watt, you would be using more electricity?

A. That would be the result. I think Mr. Anderson asked what was the purpose of the change.

Examiner Sullivan: No. He asked whether it would result in the use of more electricity.

A. Oh, yes. For the same length of time, certainly, the high wattage lamp would consume more electricity, more kilowatt-hours, than would a lower wattage bulb.

Q. (By Mr. Anderson, continuing) During the period in which the 50-150 bulb was withdrawn from the exchange program, what type of a lamp could a customer use in his table lamp to replace the 50-150 when it burned out? A. Are you referring to the fact that maybe we are out of stock of the 150-150 lamps, then what lamp would he use?

Q. You said you discontinued the 50-150 early in 1972, and I am asking you what replacement bulb was then offered that the customer could substitute for it. [3419] A. The only replacement three-way bulb would be the 50-250. However, the three-way sockets will operate with any size lamp, really. You just don't have the choices of three-way. That is, he could have put a 100 in it, he could have put the 150 in. He would not, of course, have the 50 watt for the load, but he could have substituted any one of those, yes. In fact, that is what many customers do if they don't have one on hand. They will put a normal lamp in there other than a three-way.

Q. Will a 100 watt bulb burn properly for its normal life with its socket down? A. Yes, it will.

Q. At one time you offered 50 watt bulbs, did you not?

A. That is correct.

Q. And now that has been replaced by 60 watt bulbs? A. The 50 watt lamp as an exchange lamp was discontinued. The 60 watt is now the—outside of the 25. It would go from 25 to the 60.

Q. Actually, the 50 watter was replaced with a 60 watter, wasn't it? A. Well, I don't know how you can say—

Examiner Sullivan: (Interposing) Was it replaced or did you have both?

A. Well, I believe we have both. I am not sure of the [3420] exact dates here. We had both for a short while, and then we discontinued the 50, so that this left us the 60. Now, I would have to go back to that, Mr. Anderson, to be sure of the exact dates that these were phased out.

Q. This indicates that in 1963 you had a 25 watt, a 50 watt, a 75 watt, and 100 watt bulb in your four smallest type of normal bulbs. Right? A. That is correct.

Q. Then in 1969 the 50 watt lamp was replaced by the 60 watt lamp; correct? A. This is correct. However, there would be an overlapping time period in the stocking situation. We would phase one out over a period of months, usually.

Q. What's a rough service lamp? A. A rough service lamp has a specially constructed filament to be able to take mechanical abuse, such as the extension—use of the lamp in an extension cord. The normal lamp does not have a filament structure to be able to take this type of abuse, and usually it would fail.

Q. In 1971, the year before you discontinued the 25 watt lamp and the 50-150 watt lamp, the two of them together constituted about 9 percent of your total lamp exchanges, didn't they? [3421] A. May I read this? (Indicating)

Q. Yes, sure. I thought you had. A. Well, I have, but I can't remember the exact figure.

Examiner Sullivan: How much longer will you be, Mr. Anderson?

Mr. Anderson: I have got about three more questions for this witness.

Examiner Sullivan: We will finish with him before we break, then.

The Witness: Would you repeat the question again in relation to these figures?

Q. (By Mr. Anderson, continuing) Yes. In 1971, the 25 watt lamp and the 50-150 watt lamp together represented about 9 percent of your total lamp exchanges? A. That is correct, yes.

Q. What is the difference in cost to The Detroit Edison Company between a 50-150 bulb and a 50-250 watt bulb? A. I am not exactly sure what the cost difference is. They may very well be the same. Several of the smaller wattage lamps—for instance, the 60, the 75, and the 100 are all the same price. I believe the same may be true of the 50-150 and 50-250. But I would have to check to be sure.

Q. At the time those two bulbs were discontinued in 1972, [3422] the smallest lamp then available upon exchange was the 60 watt bulb; is that correct? A. Yes. After the 25 was discontinued, yes. However, as I mentioned, I think, earlier, there was a very, very short period in there, as we ran out of stock—we discontinued this in the early part of '71, but the stock of the 25 stayed in for a considerable length of time, that is, we were still passing it out to get rid of stock. So the time interval between not having any 25's available and the time the 25 was reinstituted on the exchange list, that time interval was very short.

Q. What's the difference in cost to the Company between the 25 watt and the 60 watt bulbs respectively? A. I would have to look that up, Mr. Anderson. The 25 watt is a 2500-hour light lamp. Its principal use is for night time type burning. It is not a lamp of adequate size to be able to do any reading by or anything like this. So it is a longer light lamp in that respect. It is also used in per-

haps locations where it is difficult to change the lamp, and it has about twice the life of a normal lamp.

Q. So that— A. (Interposing) But the cost I am not sure of.

Q. So when the 25 watt lamp was discontinued and the smallest [3423] size was 60 watts, the customer who wanted to have a night light on all night would not only have to burn about two and a half times as much electricity using the 60 watter instead of the 25 watter, but the Company would also have to provide about twice as many bulbs as formerly because of the shorter life of the 60 watt bulb. Is that right?

Mr. Hogg: I don't think the question is completely correct, Mr. Anderson. I think I know what you're getting at, but not the way it's phrased. Mr. Kelley said when it was discontinued, thereafter such and such would happen. Mr. Kelley indicated there continued to be a stock of 25 watt bulbs.

Mr. Anderson: He testified there was at least a short period where they were out of 25 watts and hadn't reinstituted a policy of providing 25 watts. Whatever that period was, that is what I'm asking him.

Examiner Sullivan: I assume it would be while while they had no 25 watts.

A. I am not sure you could make the assumption that the customer would necessarily use a 60 watt lamp for a night light. I personally wouldn't.

Q. (By Mr. Anderson, continuing) What else could he do? He would have—

[3424] Examiner Sullivan: (Interposing) Go out and buy a 40 watt.

Q. (By Mr. Anderson, continuing) He would have to go out and spend his own money to get a smaller bulb? A.

That could be one of the alternatives. Many customers believe the 25 is still too much and use the 7½ watt that plugs into a socket, too. That makes a very good night light, but we don't exchange those.

Q. One final question, Mr. Kelley.

Do you have any plans at the present time to discontinue customer service offices or customer service agencies in any particular cities or communities, thereby leaving such communities without any customer office or agency? A. Mr. Anderson, we have quite a few municipalities today without an office or an agency.

Q. I understand that. I'm asking how many more, if any, are going to be without an agency or an office, under your plans.

[3433] Q. You indicated that you had made inquiry of various electric utilities regarding the appliance repair policies of other utilities. Is there any other major electric utility that offers an appliance repair policy presently offered by Detroit Edison?

Mr. Anderson: Mr. Hogg, I wonder if you could define your question a little closer.

Q. (By Mr. Hogg, continuing) Did you make inquiry regarding the appliance repair policy offered by other utilities? A. Yes, we did.

Q. Is there any major electric utility that provides free appliance repairs as The Detroit Edison Company does at the present time? A. Not of those that we inquired into, we found none that offer the same policy that we have at the present time.

Q. Do you know of any others? A. I don't know of any others, no.

Q. Mr. Kelley, I notice in your experience you have had some experience in the field of lighting, illumination? A. Yes, I have.

Q. Has the change in lamp bulbs offered to Edison customers had any relationship to the illumination desired by domestic customers? [3434] A. I would say that, yes, there is, that today our customers are more aware of the need for good lighting certainly, and I think this shows up considerably in the commercial areas where a great many of our customers work and the lighting levels have gone up considerably in many of the commercial areas, the offices, this type of thing, and once a person becomes accustomed to working under a higher light level, it is extremely difficult to go back to a much lower level. So that in that regard, I would think that the customer would be wanting higher lighting levels in the home.

Mr. Hogg: Thank you.

Mr. Anderson: I have got several questions now.

Examiner Sullivan: Let's take about a 15, 20 minute break.

(A recess was thereupon taken.)

Examiner Sullivan: Very well, we may come to order.

Mr. Anderson, you may proceed.

[3435] *Recross-Examination of Mr. Kelley by Mr. Anderson:*

Q. Mr. Kelley, when Mr. Hogg asked you if you had reviewed the policies of other utilities with respect to repair services, how many utilities did you review to see what their appliance repair policies and charges were? A. We reviewed approximately 20.

Q. And I think Mr. Hogg asked you if any of those had the same policy as Detroit Edison, and your answer was no. What did you understand Mr. Hogg's question to mean when he referred to "the same policies"? A. The same policy would be one where there is no labor charge and no appreciable charge for parts.

Now, of course, we in the small appliance area do charge for over 50 cents. But we found no utilities that do not charge for any parts in the major repairs. And a good many of these utilities—I say a good many, several of those only charge for those or only repair appliances that are purchased through the utility. Some of them have sizable mechandising programs.

Q. And I guess you said you couldn's tell me how many of those 20 impose a charge for parts or impose a charge for parts plus a nominal labor charge? [3436] A. I don't have the exact number with me, no.

Q. You mentioned that you think that the public is becoming more aware of good lighting. Have you noticed yet any trend on the part of the public to reduce the amount of lighting for either cost or ecological considerations? A. No. We have no data or any evidence to indicate that customers are not using good lighting for the purposes of ecology or to save money.

Q. Has Detroit Edison put out any advertisements in the past year or two that you are aware of urging people to reduce unnecessary lighting? A. Not specifically toward using less energy for lighting. However, we have for many years in all three classes of customers tried to help the customer get the most he can for his electric bill, that is, to use it wisely and efficiently, not to waste it.

Q. What examples do you have of that? A. We have—and this goes back a few years, when I was connected with lighting and industrial customer contact work—made many cost studies on the advantages of the mercury vapor lamps and fluorescent versus incandescent in terms of their efficiencies. And the gaseous discharge lamps are far more efficient than the incandescent in terms of light output per unit of energy.

[3437] Q. What examples do you have that related to domestic customers? A. I can't recall any specific exam-

ples in terms of the use of lighting, because I have not been completely involved with residential customers. However, we have in many ways, in terms of use of cooking facilities, our home economist gals do go out and talk with customers, have been for years instructing the customer as to the best use of the dryer, the electric range, keep the dust off the condenser on the back of the refrigerator to make it operate more efficiently, things of that nature. We have been doing this for years.

Mr. Anderson: That is all.

Mr. Hogg: No further questions.

Examiner Sullivan: All right, Exhibit A-16 is herewith received.

Mr. Kelley is excused finally.

The Witness: Thank you very much.

(The witness was thereupon excused.)

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Opinion and Order in D-1722

STATE OF MICHIGAN

BEFORE THE

MICHIGAN PUBLIC UTILITIES COMMISSION

At a session of the Michigan Public Utilities Commission held at its offices in the City of Lansing, Michigan, on the 19th day of October, A.D., 1936.

Present: Hon. William M. Smith, *Chairman;*
Hon. Emerson R. Boyles, *Commissioner;*
Hon. Ivan E. Hull, *Commissioner;*
Hon. Paul W. Voorhies, *Commissioner;*
Hon. Harold J. Waples, *Commissioner.*

D-1722

In the matter of the regulation by the Michigan Public Utilities Commission of the rates, charges, services, practices and facilities of THE DETROIT EDISON COMPANY.

In this matter, after due notice to all interested parties, a general hearing on the rates, services, charges and practices of The Detroit Edison Company was held on the 5th, 6th and 7th days of October, 1936;

A large amount of testimony was taken and certain municipalities served by The Detroit Edison Company and certain customers of said Company having been then heard; and the Commission having concurrently herewith filed an opinion to which reference is hereby made;

THEREFORE, in view of the foregoing, IT IS HEREBY HELD, FOUND AND ORDERED by the Michigan Public Utilities Commission:

1. That the electric plant, property and facilities and the steam heating plant, property and facilities owned and

operated by said utility are of necessity conducted and operated in conjunction with each other, and that conditions are such that the electric facilities and the steam heating facilities should be, and they are hereby found and held to be, a single utility, and it is held, found and ordered that the plant, property and equipment used in both of said enterprises shall be considered together and not separately;

2. That in the recent past the gross revenues and the net return of The Detroit Edison Company have been increased by an increase in the business of said utility and through economies which said utility has effected in its operation and financing; that the trend of the Company's revenues indicates the probability of a further increase in its business and its revenues during the immediate future; that the generating capacity now installed by said utility is in excess of present demands so that the Company desires to encourage the use of electrical energy through more attractive rates;

3. That, in view of the foregoing, the electrical rates of The Detroit Edison Company shall be reduced so as to give an annual saving to the electric customers of said utility in the sum of approximately $1,711,000; and that the greater share of said saving to electric customers should be for the benefit of residential and commercial customers;

4. That the Engineering Department of this Commission in conjunction with the engineering and rate staffs of that Company has made a study of the form and type of rates of The Detroit Edison Company; that the present room base residential rate applying to the Detroit and Eastern Michigan Divisions (but not to the Lake Huron Division) incorporates a demand feature based on the number of rooms in the residence which is no longer necessary or desirable and which tends to confuse the customer; that

this rate should be replaced by a straight block type of rate; and that the residence rates in the Lake Huron Division should for the purposes of uniformity and simplicity be reduced to the same rate as that now placed into effect for the older Divisions served by this Company.

The Engineering Department of this Commission finds that the installation of the simple block type of rate hereinafter set forth under the title "Residence Service" will result in estimated annual savings to the residential electric customers of The Detroit Edison Company, with a corresponding reduction in the Company's gross revenues of approximately $937,000; and that every residential customer using more energy than the energy corresponding to the monthly minimum charge will receive a reduction. The new Residence Service rate shall become effective in the entire territory served by The Detroit Edison Company on all bills for residential service rendered on and after November 1, 1936:

RESIDENCE SERVICE

CHARACTER OF SERVICE:

Who may take the Service: Householders desiring service for private residences. This rate will also be allowed for farm service in connection with the farmer's residence including all incidental uses of power within the farmsteading.

This rate will be allowed only when the premises is used as the dwelling place of the applicant and his family; when the number of bedrooms rented to paying guests is less than four and, if in an apartment building, when the apartment has complete housekeeping facilities and a floor area of not less than 340 square feet. Service to parts of residences or farmsteadings used for commercial or manufacturing purposes, to

residential hotels, rooming houses, boarding houses, groups of cabins to be rented to tourists, and, in apartment buildings to single rooms, groups of rooms, or suites not qualifying as residences will only be furnished under an appropriate Commercial Rate Schedule.

Hours of Service: 24 Hour.

Current, Phase and Voltage: Alternating current, single phase, at 115 volts two-wire or 115-230 volts three-wire, and/or three phase current suitable for standard motors rated at 220 volts, except in the direct current district of the City of Detroit where the service is direct current at 120 volts two-wire or 120-240 volts, three-wire.

Rate: Nine cents per kwhr for the first ten kwhr per residence per month.
Four cents per kwhr for the next forty kwhr per residence per month, and
Two and one-half cents per kwhr for the excess.
Bills are rendered monthly or bi-monthly, as the Company's rule in force at the time and place of the service may provide. When bills are rendered bi-monthly, the number of kilowatthours chargeable at 9¢ and the number chargeable at 4¢ are twice the stated monthly quota.

Discount: 10% for prompt payment.

Minimum Charge: For single phase alternating current and for direct current service; Fifty cents per month, less 10% for prompt payment. For three phase service: Ten dollars per month, less 10% for prompt payment.

Seasonal Reconnection Charge: For residences that are occupied only seasonally, that is, during the summer months, the fishing or hunting season, or otherwise to like effect, a charge of $1.50 less 10% for prompt payment, is made at the start of a new season for re-establishing service discontinued by the customer's order at the end of the preceding season. Likewise a charge of $1.50, less 10% for prompt payment is made for each change of name in which the account is kept, in excess of one change per calendar year.

Lamp Supply: *Incandescent lamps will be furnished without extra charge:*

(1) To residences connected for the first time to the lines, in such quantities as may be needed, but not to exceed 30 lamps to any one residence.

(2) As replacements of burned out Mazda lamps in proportion to the use of energy for lighting purposes under this rate.

Contract Term: Open Order, terminable on three days written notice by either party.

5—That the present multiplicity of commercial lighting and small power demand rates in the Detroit and Eastern Michigan Divisions is confusing to the customer and results in extra expense to the Company, and that these demand rates should be replaced by a single rate of the demand type under which both lighting and power service would be obtainable, *with free lamp replacement in proportion to the amount of the lighting load.* The Engineering Department of this Commission has estimated that the installation of the demand type rate for commercial service set forth below under the title "Commercial Demand Rate" and the introduction into the Lake Huron Division of the commer-

cial block rate now in effect in the older territory as ordered later herein, will result in an annual net saving to commercial customers of approximately $628,000.

In spite of the large overall reduction cited, it appears that certain customers taking a relatively large amount of power and a relatively small amount of lighting would have increased bills under the proposed rate. However, if a single new rate were made sufficiently low so that no customer under any of the present differing commercial rates were increased, the resulting reduction in the revenues of the Company would be too great a proportion of the total revenue reduction permissible at this time. Therefore, it appears desirable that those present commercial customers who would be adversely affected by the adoption of the new commercial demand rate should be permitted, for the time being, to continue to take service under present rates so that no customer's bill will be increased for the present as a result of the change. The present rates, however, are to be immediately withdrawn as to new customers and all present customers are to be transferred to the new rates within two years. The following commercial demand rate shall become effective in all territories served by the Detroit Edison Company on all bills rendered on and after November 1, 1936.

COMMERCIAL DEMAND RATE

CHARACTER OF SERVICE:

Who may take the Service: Persons desiring service for any purposes, provided all uses of electricity on the premises are furnished at this rate.

Hours of Service: 24 Hour

Current, Voltage and Phase: Alternating Current, single phase, at 115 volts two-wire, or 115-230 volts three wire, and/or three phase current suitable for standard motors rated at 220 volts, except in the direct current district of the City of Detroit where the service is direct current at 120 volts two-wire, or 120-240 volts three-wire.

RATE: $5.00 per month per kilowatt of demand for the first 3 kilowatts,

$3.50 per month per kilowatt for the excess demand,
Plus 1½¢ per kwhr for the first 10,000 kwhr per month,
and 1¢ per kwhr for the excess.

DISCOUNT: 10% for prompt payment.

MINIMUM CHARGE: The minimum demand charge shall be $2.50 per month less 10% prompt payment discount. There is no prescribed minimum energy (kwhr) charge. See rule No. 9 for Special Minimum Charges.

LAMP SUPPLY: *Replacements of burned out Mazda lamps will be furnished, without extra charge, in proportion to the use of energy for lighting purposes under this rate.*

CONTRACT TERM: *For Demands up to 100 Kilowatts:* Open Order, terminable on three days written notice by either party.

For Demands in Excess of 100 Kilowatts: As to continuity of service and as to reservation charge, but not as to kwhr rate: one year, extending thereafter from month to month until terminated by mutual consent or on twelve months written notice by either party. See Rule No. 15 of the Company's General Rules for installations larger than 500 kilowatts.

6—That the rates and charges of the Detroit Edison Company for street lighting service should be reduced and made uniform for all Divisions. The Company has connected to its lines some 32,600 street lamps of which approximately 18,700 are in service and 13,900 are out of service. The lamps that are out of service were turned off at the request of the municipalities who were attempting to make decreased tax revenues cover the increased expenses for relief, etc., resulting from the depression. The reduction in rates hereby ordered is made in the hope that lower rates will permit municipalities to order into service a part of the lamps which are now out of service.

The new street lighting rates hereinafter set forth are approximately ten percent lower than the existing rates now effective in the Detroit and Eastern Michigan Divisions. The new rates further provide an additional discount of five percent to those municipalities who pay their street lighting bills within thirty days after the service is rendered, so that the new rates are approximately fifteen percent lower than the existing rates if bills are paid promptly.

In the Lake Huron Division the rate now ordered is higher for certain lamp sizes and lower for other lamp sizes, but in general bills will be less for the same service under the new rate than under the present rate. Furthermore because of depression conditions and of the confusion resulting from change of ownership, the billing for street

lighting service in the Lake Huron Division is known to be at variance with the present filed rates. Because of these conditions the Company shall treat each one of the irregular situations in its Lake Huron Division on its merits, furnishing to the municipality concerned full all-night service as soon as they shall be able to pay for it. No municipality shall be brought to full service schedule with accompanying higher charges until the Company and the municipality shall have come to complete agreement. This will prevent any increase in cost to the municipalities for street lighting service without agreement thereto by the municipalities.

The estimated reduction in street lighting revenues will amount to approximately $140,000 annually as the result of the following street lighting rate changes which shall become effective, with the exceptions noted in the preceding paragraph, on all bills rendered on and after July 1, 1936 in all Divisions served by the Detroit Edison Company.

STREET LIGHTING

CHARACTER OF SERVICE:

Who may take the Service: Municipalities.

Hours of Service: One-half hour after sunset until one-half hour before sunrise each night of the year.

Kind of Service: Series incandescent street lighting from overhead lines or underground circuits. Where the number of lamps does not permit the installation of series equipment, the Company will furnish service from multiple circuits. *Charges for multiple street lamps will be identical with charges for series street lamps of approximately the same rating in lumens.*

The Company will clean, inspect, operate and maintain street lighting equipment and *furnish lamp replacements.* For underground service with the street equipment owned by the municipality the ordinary maintenance furnished by the Company covers all maintenance except major replacements such as broken lamp posts, etc. Major replacements must be paid for by the municipality.

RATE: Rate per lamp per year.

Lamp Size (Lumens)	Overhead Street Lighting Service	Ornamental Underground Street Lighting Service	
		St. equipment owned by the Company	St. equipment owned by the Municipality
1000	$18.00	$30.00*	$15.00*
2500	30.00	48.00*	24.00*
4000	36.00*	54.00*	30.00*
6000	42.00	60.00	36.00
10000	54.00	72.00	48.00
15000	66.00	84.00	60.00

* Not filed for new business.

DISCOUNT: 5% discount on bills paid within 30 days after the month in which service is rendered.

REBATE FOR OUTAGES: Pro rata rebate upon notification of the outage by the customers except that there shall be no rebate for the first night of outage.

CONTRACT TERM: Open Order, terminable by mutual agree- the outage by the customer except that there shall be party.

7—That the Company should reduce and simplify its charges for Traffic Lights Service. The present rate for Standard Traffic Lights provides a charge of $1.00 per month for 50 watts (or fraction thereof) for the first 100 watts of connected load for each installation and 50¢ per

month per 50 watts (or fraction thereof) in excess of the first 100 watts per installation. This schedule applies to the Detroit and Eastern Michigan Divisions. The charge for Standard Traffic Lights in the Lake Huron Division is $1.00 per month per 50 watts (or fraction thereof) of connected load on each connection to the Company's lines. The Company shall therefore reduce, unify and simplify these rates by substituting for the above uniform rate of 60¢ per month for 50 watts (or fraction thereof) of connected load. In reckoning connected wattage there shall be made an appropriate reduction in the reckoning for lamps operating intermittently or only at night. The new rates for traffic lights are to become effective for bills rendered on and after November 1, 1936. There will result little if any change in charges in the Detroit and Eastern Michigan Divisions; charges for traffic light service in the Lake Huron Division will be materially reduced.

8—That the present rule of The Detroit Edison Company covering "Demand Indicators—Periodic Revision of Demand—Reckoning of Demand Charge", now filed as Rule No. 12, 10th Revised Sheet No. 15, M.P.U.C. No. 2, should be revised to be consistent with the requirements of the new demand type commercial rate. Aside from those requirements, the revision of this rule should permit the redetermining from time to time of the Valley hours, so-called, now fixed in Rule No. 12 as running from 9 P.M. to 7 A.M. Also the special demand provisions applicable to gravel pits and ice plants which are a part of Rule 12 as it now stands should be withdrawn as to new business on and after November 1, 1936, and cancelled entirely as of November 1, 1938. The following general rule No. 12 shall therefore become effective in all Divisions of The Detroit Edison Company with the exceptions noted in this paragraph, in connection with all bills rendered on and after November 1, 1936.

GENERAL RULE NO. 12

DEMAND INDICATORS:

When a filed rate provides for a demand charge or a reservation charge a suitable demand indicator is installed, except where the Company considers the indicator superfluous because the service taken is small and the demand is, and continues to be, equal to the connected load.

RECKONING OF DEMAND:

Commercial Demand Rate: Demand indicators are read monthly at the time of the scheduled meter reading. The normal billing demand is the highest single reading of the demand indicator established during the billing period.

Apartment houses may elect to be billed at a reckoned demand of 400 watts per apartment in lieu of a metered demand. Every apartment, occupied or vacant, shall be counted in reckoning the demand. Rooming houses may elect to be billed at a reckoned demand of 100 watts per room in lieu of a metered demand. The number of rooms shall be determined according to the customary real estate count. For both apartment houses and rooming houses the demand will be reckoned by dividing the metered kwhr by 500 hours if the apparent hours of use of the demand reckoned from room count exceed 500 hours per month. Any operator of an apartment house or rooming house may avail himself of reckoned demand privileges by providing for it in his agreement for service.

Primary Supply Contracts: The daily demand is the average of the three highest readings of the demand indicator in each day, or two-thirds of the one highest reading whichever is higher. The normal billing demand is the highest daily demand established during the billing period.

VALLEY HOURS USE:

Periods of light load on the Company's power houses are known as valley hours. To encourage use of power at these times the Company offers to its large customers a lessened reckoning of demands occurring during valley hours. In such cases the billing demand shall be the highest daily demand reckoned as [follows]:

Commercial Demand Rate: To the highest single demand in each day, excluding valley hours, shall be added one-third of the amount by which it is exceeded by the highest single valley hours demand for the same calendar day.

Primary Supply Contracts: To the average of the three highest demands occurring in each day, excluding valley hours, (or two-thirds of the single highest demand in the same period, whichever is higher) shall be added one-third of the amount by which it is exceeded by the highest single valley hours demand for the same calendar day.

From time to time the Company will issue to the Michigan Public Utilities Commission and to valley hours customers a bulletin setting forth a schedule of valley hours which will become effective thirty days after the date of the bulletin and will continue effective until the effective date of the succeeding bulletin.

Any customer may elect to avail himself of valley hours privileges provide that his indicated demand exceeds ten kilowatts, that his valley hours demand exceed his non-valley hours demand, and that, for customers on the Commercial Demand Rate, provision shall have been made in the agreement for service for suitable metering equipment.

SPECIAL DEMAND DETERMINATIONS:

For sales of current to municipalities or others for street lighting the billing demand (if a billing demand is required by the filed rate) is the one highest reading of the demand indicator during the billing period.

9—That in view of having now ordered the same residence, commercial demand and street lighting rates in the Lake Huron Division as in the Detroit and Eastern Michigan Divisions, it is desirable for the purpose of unifying the territory served to make all rates identical throughout the entire territory of The Detroit Edison Company. Such action will result in a further saving of approximately $6,000 which is in addition to all savings previously recited.

One rate, the commercial block type rate, thus made effective is expected to adversely affect possibly 42 commercial customers in the City of Lapeer. There exists in that City a special commercial block rate which is lower than the Detroit block rate now being made effective and is also lower than existing rates in adjacent territory and which is therefore, in the opinion of the Commission, discriminatory. The general revision of all rates to uniformity produces substantial savings in other schedule in the City of Lapeer and warrants the elimination of the special rate.

Therefore the entire rate schedule of The Detroit Edison Company known as M.P.U.C. No. 1 applying to its Lake Huron Division, except as otherwise provided herein, shall be cancelled as of November 1, 1936 and the Lake Huron Division be thereafter served at the same rates as the Detroit and Eastern Michigan Divisions.

10—That the following rate sheets of The Detroit Edison Company which are a part of its rate schedule, M.P.U.C. No. 2 be cancelled on and after November 1, 1936:

General Rule No. 12 now filed as Tenth Revised Sheet No. 13.

"Residence Service (optional rate)", now filed as Second Revised Sheet No. 51.

11—That the following commercial demand rate sheets of The Detroit Edison Company which are a part of its rate Schedule M.P.U.C. No. 2 shall be withdrawn as to new customers as of November 1, 1936 and shall be cancelled for all customers as of November 1, 1938:

"Standard Lighting Contract (regular form)" now filed as Original Sheet No. 41.

"Standard Power Contract (direct current service)" now filed as First Revised Sheet No. 61.

"Standard Power Contract (alternating service)" now filed as First Revised Sheet No. 62.

"Secondary Supply Contract" now filed as Third Revised Sheet No. 64.

12—That the following street lighting rate sheets of The Detroit Edison Company which are a part of its rate schedule M.P.U.C. No. 2 be cancelled effective as of July 1, 1936:

"Street Lighting (overhead systems)" now filed as First Revised Sheet No. 121.

"Street Lighting (ornamental systems) (Equipment owned by the Company)" now filed as Second Revised Sheet No. 122.

"Street Lighting (Ornamental systems) (Equipment by the customers)" now filed as Second Revised Sheet No. 123.

13—That the Company shall reconsider and revise its other rules for electric service incorporated in its rate schedule, and that the Company shall submit to the Commission on or before November 15, 1936 revised and sim-

plified rules. By reason of recent cancellations or revisions of several rate sheets of the Company, including the cancellation of the entire rate schedule for the Lake Huron Division known as M.P.U.C. No. 1, and by reason of the proposed revision and simplification of the supplemental rules, it is ordered that the Company prepare a complete new rate schedule to be known as "M.P.U.C. No. 3" which shall be uniformly applicable to all Divisions of the Company and that it submit the new schedule to the Commission for approval. The revision of the rules of the Company ordered by this paragraph is to be limited to simplification and clarification and is not to affect rates and charges.

14—The Commission retains jurisdiction of the matters herein contained and will issue such further order or orders as the circumstances require after due notice to the parties concerned.

MICHIGAN PUBLIC UTILITIES COMMISSION

WILLIAM M. SMITH	Chairman
EMERSON R. BOYLES	Commissioner
IVAN E. HULL	Commissioner
PAUL W. VOORHEIS	Commissioner
HAROLD J. WAPLES	Commissioner

CKW:CO

Intervenors in Case No. U-4807

STATE OF MICHIGAN

Office of the Michigan Public Service Commission

I, EARL B. KLOMPARENS, Secretary of the Michigan Public Service Commission, Do Hereby Certify that the attached sheets list to the best of my knowledge all of the Intervenors and Interested Parties that appeared before the Michigan Public Service Commission in Case No. U-4807, In the matter of the application of THE DETROIT EDISON COMPANY for authority to amend its rate schedules governing the supply of electric energy and to amend other miscellaneous rates.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Commission, at Lansing, this 12th day of December in the year of our Lord one thousand nine hundred seventy-five.

EARL B. KLOMPARENS
Secretary

THE DETROIT EDISON COMPANY

U-4807

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Excerpts from the Opinion and Order in Case No. U-4771

STATE OF MICHIGAN

BEFORE THE

MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-4771

In the matter of standard filing requirements for electric utilities with annual revenues of $400,000,000 or more on the motion of the Commission.

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan, on the 24th day of February, 1975.

Present: Hon. WILLIAM G. ROSENBERG, *Chairman;*
Hon. LENTON G. SCULTHORP, *Commissioner;*
Hon. WILLIAM R. RALLS, *Commissioner.*

OPINION AND ORDER ADOPTING STANDARD RATE APPLICATION FILING FORMS AND INSTRUCTIONS

The Commission has dual and complementary responsibilities in the regulation of electric utilities. Within the limits of its statutory powers, the Commission must attempt to assure adequate and reliable electric power for the public at the lowest possible cost and must provide investors in electric utilities a fair return on their investment.

It is evident from the experience of recent years that the traditional regulatory process requires modification if the Commission is to effectively discharge its responsibilities. *The number of participants in major rate cases and the scope of their participation have steadily grown. As the questions which underlie utility regulation have become more complex, the decisions required of the Commission have become more complicated and difficult. As a result, the time, energy, and expense necessary to complete a major rate case have increased.* Additionally, the fundamental issues surrounding the availability of power in the future have become more salient. It is clear that all of these new forces require the Commission to continually monitor its procedures and to take the actions necessary to improve the rate case process.

There is no shortcut which will enable the Commission to make rate decisions more quickly and, at the same time, have and consider all pertinent information. Instead, a variety of devices must be tested and employed to both streamline the process and insure that the pertinent data are available to the Commission. The Commission has previously taken steps to modernize its regulation of electric utilities, including the use of forward-looking test years and requiring extensive investigation into innovative types of rate design. The Commission is convinced that it is now appropriate to take another step through the adoption of standard filing requirements for major electric rate cases.

The general pupose for the filing requirements is threefold.

First, the requirements will make the processing of rate cases more orderly. Because all parties to the case will share a common starting point, the Commission will be able to better understand the financial situation of the applicant utility. Further, each rate case will be presented with a substantial measure of uniformity and, therefore, comparisons among cases will be facilitated.

Second, the filing requirements will assist in shortening the time required to complete a rate case. With a standard format for rate case filings and standard methods of calculating and presenting particular adjustments, the participants in the process should be able to spend less time in locating and understanding pertinent issues in the case.

Third, increased and consistent information will be available to the Commission about the relationship of the proposals made in the rate case to the interest of the public in adequate and reliable electric power.

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Excerpts from the Opinion and Order in Case No. U-4570

STATE OF MICHIGAN

BEFORE THE

MICHIGAN PUBLIC SERVICE COMMISSION

• • •

Case No. U-4570

In the matter of the application of
THE DETROIT EDISON COMPANY

for authority to amend its rate schedules governing the supply of electric energy.

At a session of the Michigan Public Service Commission held at its offices at Lansing, Michigan, on the 3rd day of February, 1975.

Present: Hon. WILLIAM G. ROSENBERG, *Chairman;*
Hon. LENTON G. SCULTHORP, *Commissioner;*
Hon. WILLIAM R. RALLS, *Commissioner.*

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On April 15, 1974, The Detroit Edison Company (Applicant) filed its application in this matter requesting that the Commission conduct hearings and thereafter approve for Applicant additional annual revenues of at least $93,048,000. At the time of filing its application, Applicant also filed a Motion for Interim Partial and Immediate Revenue Relief requesting that, pending a final order in this case, the Commission grant Applicant authority to place into effect a surcharge of 8.3% on all bills issued to its customers, for the generation of $61,100,000 of additional annual revenues. Concurrent with its application and its

Motion for Interim Partial and Immediate Revenue Relief, Applicant filed the written direct testimony of its proposed witnesses together with its proposed exhibits.

On April 29, 1974, the Commission issued its Order and Notice of Hearing and Notice of Hearing on Motion for Interim Partial and Immediate Revenue Relief (Order and Notice of Hearing) which, among other things, summarized Applicant's proposed surcharge of 8.3% on all bills for electric service to produce the additional revenues requested in its Motion for Interim Partial and Immediate Revenue Relief. *The Order and Notice of Hearing also required that Applicant publish notice of hearing in the same newspapers throughout its electric service area and in substantially the same style and manner as the notice of hearing which was published in Case No. U-4257. In addition, Applicant was required to mail a copy of the notice of hearing to all cities, incorporated villages, counties and townships within its electric service area as well as to all intervenors or participants who had appeared in Cases Nos. U-3910 or U-4257, being the most recent two electric rate increase proceedings of Applicant.*

The Order and Notice of Hearing established the following hearing dates:

1. May 28, 1974, in Lansing, for an initial hearing in the nature of a Prehearing Conference.
2. May 30 and 31, 1974, in Detroit, for commencing public hearings for the special purpose of taking statements and testimony of interested persons. A special evening hearing for this same purpose was scheduled for 7:00 p.m. on May 30, 1974.
3. June 24, 1974, in Lansing, for continuation of public hearings for the special purpose of taking statements and testimony of interested persons, and for the purpose of commencing cross-examination of Applicant's witnesses.

The initial hearings proceeded as scheduled. Cross-examination of the direct testimony of Applicant's witnesses commenced on June 24, 1974, continued on June 25, 26, 27 and 28; July 1, 2, 3, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30 and 31; August 1, 2, 5, 6, 7, 8, 9, and was completed on August 13, 1974.

On June 18, 1974, Applicant Filed a Supplemental Motion for Interim Partial and Immediate Revenue Relief and Motion for Emergency Hearing, requesting that the Commission, pending final order in these proceedings, authorize Applicant to impose a surcharge of 9.1% on all bills issued to its customers for electric service as a means of producing additional annual electric revenues of $67,600,000 which additional revenues it requested the Commission to approve in its Supplemental Motion for Partial and Immediate Revenue Relief. Responsive pleadings opposing the aforesaid Motion were filed by the city of Grosse Pointe Park, the Staff of the Michigan Public Service Commission (Staff), and the Attorney General of the State of Michigan. On July 12, 1974, the Hearings Examiners (Examiner) dismissed the Supplemental Motion, and on July 18, 1974 Applicant appealed the Examiner's ruling to the Commission. On August 13, 1974, Applicant filed a Renewed Motion for Interim Partial and Immediate Revenue Relief, withdrew its appeal of the Examiner's ruling of July 12, 1974, and requested that the Commission, pending issuance of a final order in these proceedings, grant Applicant authority to impose a surcharge of 8.3% on all bills issued to its customers for electric service, as a means of producing additional annual revenues of $61,100,000.

On August 14, 1974, the Commission issued a Notice of Hearing on Renewed Motion for Interim Partial and Immediate Revenue Relief and ordered a copy of said notice to be served on all parties of record, including all Rule 11 Intervenors and Rule 16 participants in this proceeding. On

August 27, 1974, the Staff filed its Investigation and Report Concerning Partial and Immediate Rate Relief in accordance with Commission procedure for interim relief and pursuant to the schedule established by the August 14, 1974 notice of hearing.

For the convenience of the witness, the time for cross-examination of Dr. Ralph Turvey of London, England, a witness on behalf of the Environmental Defense Fund and the West Michigan Environmental Action Council, was set on August 19 through 21, 1974. Dr. Turvey's testimony was filed on August 6, 1974 and the testimony of Dr. Charles J. Cicchetti, an additional witness on behalf of the same Intervenors, was filed on August 13, 1974. However, Dr. Cicchetti was not cross-examined until the time period regularly scheduled for cross-examination of the Staff's and Intervenors' cases.

Cross-examination of the Staff Investigation and Report filed with respect to Applicant's Renewed Motion for Interim Relief commenced on September 9, 1974 in accordance with the notice of hearing and was concluded on September 11, 1974.

The Examiner ordered that briefs on Applicant's Renewed Motion for Interim Partial and Immediate Revenue Relief be filed no later than September 18, 1974.

On September 30, 1974, the Commission entered its Order Granting Partial and Immediate Rate Relief which authorized Applicant, commencing October 1, 1974, to impose a surcharge of .931 mills (net) per kilowatt hour sold on its electric rate schedules, except for certain specified rate schedules, as a means of generating the additional $30,287,000 annual electric revenues authorized in such order.

On September 13, 1974, the Attorney General of the State of Michigan, the City of Detroit and the County of Wayne appealed the Examiner's rulings of September 10 and 11,

1974 that the Attorney General could not present witnesses and exhibits on Applicant's Renewed Motion for Interim Partial and Immediate Revenue Relief. In its September 30, 1974 interim order, the Commission ruled that ". . . other parties do not have a statutory right to submit evidence with respect to a motion for partial and immediate relief . . ." However, the Commission further stated in said order that:

> ". . . the Attorney General's proferred testimony and exhibits have been accepted and treated as matter offered in support of his opposition to interim relief."

Intervenors and the Staff were directed by the Examiner to file their written direct testimony and exhibits on or before September 19, 1974. Cross-examination of the direct case of the Intervenors and Staff commenced on September 30, 1974 and continued on October 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18 and was completed on October 21, 1974.

All parties filed the written direct testimony and exhibits constituting their rebuttal cases on November 4, 1974. Cross-examination of Applicant's rebuttal case commenced on November 12, 1974 and the hearing on the rebuttal phase of these proceedings continued on November 13, 14 and was completed November 15, 1974.

Among the Intervenors actively participating in this case were the Attorney General of the State of Michigan; The Environmental Defense Fund, Inc.; West Michigan Environmental Action Council; Michigan UAW-CAP; General Motors Corporation; Great Lakes Steel Division, National Steel Corporation; McLouth Steel Corporation; Jones & Laughlin Steel Corporation; Chrysler Corporation; Monsanto Company; City of Grosse Pointe Park; City of Grosse Pointe Woods; City of Ferndale; City of Detroit; and the County of Wayne. Morton Salt Company filed a petition for leave to intervene shortly before the close of the record

in the case and was permitted to intervene for the purpose of filing briefs. Reference to the Attorney General includes the UAW-CAP, City of Detroit and County of Wayne throughout this order unless otherwise specified as these parties generally took the same positions.

On November 7, 1974, Applicant filed a Motion for Additional Interim Partial and Immediate Revenue Relief. Notice of Hearing was issued on November 8, 1974 and hearing on said motion was held November 22, 1974. The Commission finds that no action is necessary on the additional motion, it being rendered moot by the issuance of this Opinion and Order.

Chief Hearings Examiner Alfred A. Sullivan and/or Hearings Examiner Arnold W. Tammen (Examiner) presided at all 64 days of hearings held in this proceeding.

There were 97 exhibits offered or introduced into evidence and the 61 volumes of transcript of the proceedings for the 64 days of hearings comprise 7,509 pages. In addition, portions of 12 volumes of transcript, comprising parts of 12 days of hearing in Case No. U-4576 (Consumers Power Company electric rate case) were incorporated by reference into the record in this proceeding.

In order that the record of the proceedings be freely available to the public in Applicant's service area, the Examiner directed that Applicant file a copy of the transcript of the proceedings in the public library in each of four communities—Dearborn, Detroit, Ferndale and Grosse Pointe. Counsel for all parties were directed to file copies of all exhibits in each of the above libraries.

The Examiner directed that briefs be filed by all parties by December 13, 1974. Briefs were filed by Applicant, the Staff and most of the Intervenors participating in this case. No provision was made for the filing of Reply Briefs.

On December 30, 1974, the Examiner issued his Proposal for Decision recommending final rate relief for Applicant

in the amount of $85,136,000 or $54,849,000 above the interim relief previously granted by the Commission. Filing of exceptions to the Proposal for Decision was set for all parties on January 13, 1975. There was no provision made for Replies to Exceptions to the Proposal for Decision. On January 6, 1975 and on January 8, 1975, the Attorney General and UAW-CAP by motion requested additional time for filing exceptions. Both Motions were denied by the Examiner. The Attorney General then appealed the denial, which was affirmed by unanimous order of the Commission at a special meeting on January 10, 1975. The decision rendered herein is based solely upon examination and consideration of the record, including the briefs, the Proposal for Decision, and the exceptions of the parties in this proceeding.

II.

Description of Applicant

Applicant is a corporation organized and existing under the laws of the states of Michigan and New York. Its principal offices are located at 2000 Second Avenue, Detroit, Michigan. Applicant is a public utility principally engaged in the business of generating, transmitting, transforming, distributing and selling electric energy. Approximately 2% of Applicant's revenues are derived from the sale of steam.

The service area of Applicant is in Southeastern Michigan extending from near Monroe on the South to the Thumb area of Michigan on the North, and includes the populous area of Metropolitan Detroit. Applicant's total service area extends over approximately 7,600 square miles and includes approximately 1,572,184 electric customers. Applicant's common stock is held by over 155,000 stockholders, approximately 60% of whom reside in the State of Michigan.

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III.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCLA 460.551 et seq.; 1909 PA 300, as amended, MCLA 462.2 et seq.; 1919 PA 419, as amended, MCLA 460.51 et seq.; 1939 PA 3, as amended, MCLA 460.51 et seq.; 1969 PA 306, as amended, MCLA 24.201 et seq.; and the Commission's Rules of Practice and Procedure, 1954 Administrative Code, Supplement No. 54, R 460.11 et seq.

b. The statutory requirements of Section 81 of 1969 PA 306, as amended, have been complied with in that an Examiner's Proposal for Decision was issued on December 30, 1974 and the parties have been given reasonable opportunity to submit exceptions thereto.

c. The statutory requirements of Section 85 of 1969 PA 306, as amended, have been complied with in that the Commission has ruled upon all proposed findings submitted by the parties which would control this Opinion and Order.

d. A rate base for Applicant's electric operations of $2,763,748,000 is just and reasonable.

e. An overall rate of return of 8.57%, including a return on common equity of 12.12%, is just and reasonable.

f. The jurisdictional adjusted net operating income for the test year in this case is $203,875,000.

g. The revenue deficiency before earnings erosion allowance is $68,792,000.

h. The earnings erosion allowance is $17,295,000.

i. Applicant's financial condition has rapidly deteriorated since the last order of this Commission in Case No.

U-4257, seriously impairing its present and future ability to provide adequate service to the public.

j. Applicant's fuel cost adjustment clause should be amended to reduce the lag between the occurrence and recognition of increased or decreased costs of fuel in the monthly adjustment and should include a variable heat rate for commercial and industrial customers as described in this Opinion and Order.

k. Applicant is experiencing an annual revenue deficiency of $86,087,000 and an increase in Applicant's electric revenues in that amount is reasonable and in accordance with other findings and conclusions contained in this Opinion and Order.

l. The Order Granting Partial and Immediate Rate Relief issued by the Commission on September 30, 1974, approving electric rates on an interim basis pending the issuance of this order, was designed to produce additional annual electric revenues in the amount of approximately $30,287,000. The collections of revenues by Applicant under these interim electric rates during the period from October 1, 1974 to the date of this order is hereby confirmed and Applicant's bond filed with the Commission to assure refund is hereby cancelled.

m. An increase in Applicant's annual electric revenues in the amount of $55,800,000 over and above the revenue increase granted to Applicant in the Order Granting Partial and Immediate Rate Relief is just and reasonable and in accordance with the findings and conclusions contained in this Opinion and Order.

n. The rate for steam service to Monsanto Company (Trenton Channel Plant) should include a demand charge of $2.05 per lb. per year of contract demand and an energy charge of $.84 per M lbs., subject to fuel adjustment.

o. The rate for steam service to Great Lakes Steel Division, National Steel Corporation, from Applicant's Delray plant should include a demand charge of $2.46 per lb. per year of contract demand and an energy charge of $1.05 per M lbs., subject to fuel adjustment, and the rate for steam service from Applicant's River Rouge plant should include a demand charge of $3.07 per lb. per year contract demand and an energy charge of $.95 per M lbs., subject to fuel adjustment.

p. The rate for steam service to Morton Salt Company should include a demand charge of $1.92 per lb. per year of contract demand and an energy charge of $0.87 per M lbs., subject to fuel adjustment.

q. Applicant should be authorized to offer an interruptible rate to customers whose interruptible demand is greater than 10,000 kw.

r. The electric rate schedules attached hereto as Exhibit A will increase Applicant's annual electric operating revenues as authorized by this Opinion and Order and will result in just and reasonable rates and charges for the sale of electric energy and should be made effective for service rendered on and after February 4, 1975.

s. Applicant should be directed within 120 days to submit a plan for an on-line study of the feasibility of establishing time-of-day rates for all of its rate classes.

t. Applicant should be directed to immediately proceed to conduct the studies outlined in this Opinion and Order.

u. All contentions and proposed findings of the parties not herein specifically determined are hereby rejected, the Commission having given full consideration to all evidence of record and arguments made in arriving at the findings and conclusions set forth in this Opinion and Order.

THEREFORE, IT IS ORDERED that:

A. The Detroit Edison Company is hereby authorized to revise its rates for electric service so as to provide an increase in annual electric revenues in the amount of $55,800,000 over and above the electric rates approved by the Commission in its Order Granting Partial and Immediate Rate Relief dated September 30, 1974.

B. The rate schedules of The Detroit Edison Company, attached hereto as Exhibit A are hereby approved for electric service rendered on and after January 4, 1975.

C. The approved fuel cost adjustment clause of The Detroit Edison Company is hereby amended, as incorporated in Exhibit A attached hereto, and approved for electric services rendered on and after January 4, 1975.

D. *In conformance with Commission Order No. D-3096, Filing Procedures, The Detroit Edison Company shall promptly file with the Commission rate schedules substantially the same as those attached hereto as Exhibit A.*

E. The special contract between Applicant and Monsanto Company (Trenton Channel Plant) shall be modified as set forth in the Special Contract Revisions section of Exhibit A attached hereto.

F. The special contract between Applicant and Great Lakes Steel Division, National Steel Corporation, shall be modified as set forth in the Special Contract Revisions section of Exhibit A attached hereto.

G. The special contract between Applicant and Allied Chemical Corporation shall be modified as set forth in the Special Contract Revisions section of Exhibit A attached hereto.

H. The special contract between Applicant and Morton Salt Company shall be modified as set forth in the Special Contract Revisions section of Exhibit A attached hereto.

I. The Detroit Edison Company shall within 120 days of issuance of this order submit a plan for conducting an on-line study of the feasibility of establishing time-of-day rates for all of its rate classes.

J. The Detroit Edison Company shall proceed immediately to conduct the studies as outlined in this Opinion and Order in cooperation with the Commission Staff.

K. All contentions and proposed findings of the parties not herein specifically determined are hereby rejected, the Commission having given full consideration to all evidence of record and arguments made in arriving at the findings and conclusions set forth in this Opinion and Order.

The Commission specifically reserves jurisdiction of the matters herein contained and the authority to issue such further order or orders as the facts and circumstances may require.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ WILLIAM G. ROSENBERG
Chairman

/s/ LENTON G. SCHULTHORP
Commissioner

Commissioner William R. Ralls is issuing a separate Dissenting Opinion.

By the Commission and pursuant to
its action of February 3, 1975.

/s/ EARL B. KLOMPARENS

Its Secretary

Excerpts from the Tariff in Case No. U-4570

M.P.S.C. No. 7 *First Revised* Sheet No. B5

RULES AND REGULATIONS—Continued

B-5.1 SERVICE CONNECTIONS—All wiring upon the customer's premises shall be brought by the customer to any suitable point of service specified by the Company. Only one service connection is installed to a building or group of buildings including adjacent service areas under a single ownership except where separate service is required for disturbing use of service or where in the judgment of the Company additional services are necessary or desirable for operating reasons or because of the requirements of public safety. Detailed specifications for service connections will be furnished upon request at any customer business office.

B-5.2 CUSTOMER'S INSTALLATION—All wiring on the customer's premises shall be installed and maintained in accordance with applicable laws and the rules of the governmental authority having jurisdiction, the National Electrical Code and the rules of the Company.

The customer shall provide, free of expense to the Company, a suitable place for the meter or meters and any other supply, protective or control equipment of the Company which may be required in the delivery of the service.

B-5.3 COMPANY EQUIPMENT ON CUSTOMER'S PROPERTY—The Company will keep in repair and maintain its own property installed on the premises of the customer. All equipment supplied by the Company shall remain its exclusive property, and the Company shall have the right to remove the same from the premises of the customer at any time after the termination of service from whatsoever cause.

The customer shall be responsible for the safekeeping of the Company's property and shall not permit any person except an authorized Company representative to break any seals upon, or do any work on, any meter or other apparatus of the Company located on the customer's premises.

B-5.4 ACCESS TO PREMISES—As a condition of taking service, authorized employes and agents of the Company shall have access to the customer's premises at all reasonable hours to install, inspect, read, repair or remove its meters, and to install, operate and maintain other Company property, and to inspect and determine the connected electrical load. Authorized employes and agents shall carry identification furnished by the Company and shall display it upon request. Failure to provide access for any of the above reasons may result in termination of service.

B-5.5 LAMP SUPPLY: *Incandescent lamps will be furnished without extra charge:*

(1) To residences connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.

(2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under the applicable rate.

Issued: February 3, 1975
By: R. W. Hartwell
Senior Executive Vice President
Finance and Corporate Affairs
2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after February 4, 1975 under authority of Order of the Michigan Public Service Commission dated February 3, 1975 in Case U-4570.

M.P.S.C. No. 7 *Sixth Revised* Sheet No. D1

DOMESTIC SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for all domestic purposes through one meter to a single occupancy or individual dwelling unit including farm dwellings. Service to appurtenant buildings may be taken on the same meter.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire. Where available, and the demand justifies, three-phase, four-wire, Y connected service may be had at 120/208 volts nominally.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Service Charge:
$2.40 per customer per month plus,

Energy Charge:
2.82¢ per KWh for all KWh, plus fuel adjustment.

FUEL ADJUSTMENT: See Schedule Designation B-4.6.

MINIMUM CHARGE: $2.40 per month.

LAMP SUPPLY: *See Schedule Designation B-5.5.*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: February 3, 1975
By: R. W. Hartwell
Senior Executive Vice President
Finance and Corporate Affairs
2000 Second Ave., Detroit, Michigan 48226

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M.P.S.C. *Sixth Revised* Sheet No. D2

DOMESTIC SPACE HEATING RATE

AVAILABILITY OF SERVICE: Available on an optional basis for customers desiring service for all domestic purposes only to a single occupancy or dwelling unit including farm dwellings in which all of the space heating is supplied by electric service through the same meter and is installed on a permanent basis.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single phase, nominally at 120/240 volts, three-wire. Where available, and the demand justifies, three-phase, four-wire, Y connected service may be had at 120/208 volts nominally.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt three-wire service may be taken.

RATE PER MONTH:

Service Charge:
$2.40 per customer per month plus,

Energy Charge:
2.82¢ per KWh for all KWh, plus fuel adjustment, except that during the billing months of November through May, usage in excess of 1,000 KWh per month shall be billed at 2.25¢ per KWh, plus fuel adjustment.

FUEL ADJUSTMENT: See Schedule Designation B-4.6.

MINIMUM CHARGE: $2.40 per month.

LAMP SUPPLY: *See Schedule Designation B-5.5.*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: February 3, 1975
By: R. W. Hartwell
Senior Executive Vice President
Finance and Corporate Affairs
2000 Second Ave., Detroit, Michigan 48226

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M.P.S.C. No 7 *Fifth Revised* Sheet No. D3

GENERAL SERVICE RATE

AVAILABILITY OF SERVICE: Available to customers desiring service for any purpose, except that this rate is not available for service in conjunction with the Large General Service Rate, nor to installations having a demand of over 1000 kilowatts, including applicable riders, not taking service on this rate prior to August 19, 1972.

The 1000 kilowatt limitation may be waived for the following cases:

1. For temporary installations where the customer pays the "in and out" charges.
2. For Primary Supply installations during construction while the building is under jurisdiction of the contractor.

Standby service not available under this rate.

HOURS OF SERVICE: 24 hours.

CURRENT, PHASE AND VOLTAGE: Alternating current, single, phase, nominally at 120/240 volts, three-wire; or three phase four-wire, Y connected at 120/208 volts; or under certain conditions three phase four-wire, Y connected at 277/480 volts.

Except that, in certain city districts, alternating current is supplied from a Y connected secondary network from which 120/208 volt, three-wire or 120/208 volt, three phase four-wire service may be taken.

RATE PER MONTH:

Service Charge:

$3.50 per customer per month plus.

Energy Charge:

3.50¢ per kilowatthour plus fuel adjustment for the first 10,000 KWh.

3.00¢ per kilowatthour plus fuel adjustment for the excess KWh.

FUEL ADJUSTMENT: See Schedule Designation B-4.6.

LATE PAYMENT CHARGE: See Schedule Designation B-2.10.

MINIMUM CHARGE: $3.50 per month.

LAMP SUPPLY: *See Schedule Designation B-5.5(2).*

CONTRACT TERM: Open order, terminable on three days written notice by either party. Where special services are required, or where the investment to serve is out of proportion to the revenue derived therefrom, the term will be as specified in the applicable contract rider.

WATER HEATING SERVICE: Water heating service is available on an optional basis. See Schedule Designation No. D5.

Issued: February 3, 1975
By: R. W. Hartwell
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2000 Second Ave., Detroit, Michigan 48226

Effective on service rendered on and after February 4, 1975 under authority of Order of the Michigan Public Service Commission dated February 3, 1975 in Case U-4570.

Supreme Court, U. S.
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No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a New York corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
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LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a New York corporation,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT

Petitioner's position is stated simply:

1. The Michigan Public Service Commission ("MPSC") does not have the authority to regulate a light bulb distribution program and

2. In any event, the MPSC's action with respect to Respondent's light bulb program, however one wants to characterize it, is not the command of the sovereign within the meaning of *Parker* v. *Brown,* 317 U.S. 341 (1943).

Nothing suggested in Respondent's brief, whether of fact or law, overcomes Plaintiff's assertions.

I. NO LEGISLATION IS OFFERED BY RESPONDENT TO JUSTIFY THE AUTHORITY OF THE MPSC TO REGULATE LIGHT BULB DISTRIBUTION.

Respondent asserts that "Detroit Edison's Lamp Supply Program is Required by State Legislative Command" (Respondent's Brief, page 23).[1] However, Respondent cites no authority for this proposition. Indeed, no such authority exists. In absence of such authority, Respondent manufactures its own when it states:

> "The combined effect of Michigan's public utility statutes as interpreted by the Supreme Court of Michigan is that the MPSC's *approval* of Detroit Edison's rates which include the cost of providing light bulbs, binds Detroit Edison by a state legislative mandate to continue that program until the MPSC may order otherwise." (R.B. 30). (Emphasis supplied)

Respondent's first step in the manufacturing process is the citing of *Michigan Bell Telephone Co.* v. *Michigan Public Service Commission,* 315 Mich. 533, 24 N.W. 2d 200 (1946). (R.B. 29) But, analysis of the case leaves Respondent short of the mark. In this case, Michigan Bell successfully resisted an order of the MPSC requiring a refund to customers. The Court found the rate order, like legislation, could not have a retroactive effect. The holding does not establish that the Commission's orders have the force of sovereign legislation, but only that like legislation, Commission orders are prospective.[2] Moreover, the order considered clearly dealt with rates over which the MPSC does have authority.

[1] References made to Respondent's Brief hereinafter will be designated as "R.B.", followed by appropriate page number.

Respondent then cites MCLA 460.558 (which it fails to set out in its Brief or appendix) for the proposition that it faces possible criminal sanctions for not complying with an MPSC order (R.B. 30) and MCLA 460.552, which states, "no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission *approving* said rate or charge." (R.B. 30, N. 32). (Emphasis supplied) Continuing its manufacturing process Respondent then argues that by eliminating the lamp service Edison would be obtaining a *de facto* rate increase. (R.B. 29). This combination of judicial, legislative and regulatory conditions is apparently proposed by Respondent as a substitute for the legislative command required by *Parker* v. *Brown.* At the risk of being redundant, it must be said again that the authority to make rates (charges) for electricity (MCLA 460.552) and to control the rules and conditions under which electricity is transmitted and distributed (MCLA 460.551) does not give the MPSC authority to regulate Respondent's distribution of light bulbs.[3] The power to

[2] In fact, this case supports Petitioner in his rebuttal to Respondent's suggestion that Petitioner has not exhausted his administrative remedies. (See infra p. 12)

[3] Edison refers to the collection of its tariffs for classes of customers as the "Schedule of Rates Governing the Sales of Electricity" (see Petitioner opening brief, p.3, n.1) and to the tariff for each class of customer as a "service rate". The word "rate" as used by Edison in the titles and headings of its tariffs is not consistent with the use of the word "rate" in MCLA 460.552. The only

make rules or orders does not give the MPSC the power to direct or control beyond its statutory authority. *Helvering* v. *Sabine Transportation Co., Inc.,* 318 U.S. 306, 311-12 (1943); *Rock* v. *Carney,* 216 Mich. 280, 284, 185 N.W. 798, 799 (1921).[4] If any further proof is needed that the MPSC does not have authority in law to regulate light bulbs Respondent provides it by admitting that at best the MPSC's authority to regulate the lamp program through the rate making process is *de facto* power only (R.B. 49).

Respondent, despite this Court's disfavor of antitrust exemptions, implies a new exemption from the antitrust laws for regulated industries beyond the limits of *Parker* v. *Brown. U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963). Respondent has not offered any justifiable reason for such an exemption.

---

[3] (Continued)
use of the word "rate" which is consistent with its statutory meaning is when Edison uses that word to refer to the charge for electricity (see 215a). Respondent's brief alternatively refers to "rates which include the cost of providing bulbs" (R.B. 30) and the bulb program included in the "service rate" (R.B. 15, N.24). The Court should be careful not to fall into the same trap as Respondent counsel and conclude that because the light bulb program is described on the Service Rate page that it is also included within the rate.

[4] Petitioner takes no issue with the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Freight, Inc.,* 365 U.S. 127 (1961). Respondent certainly is free to petition the legislature or any agency of the State of Michigan to obtain anticompetitive protection or benefits. The thrust of Petitioner's complaint, however, is that in the exercise of its "Noerr-Pennington" right Respondent better be sure the agency petitioned had the requisite authority to provide the benefit sought, that meaningful disclosure is made to the agency and that the agency acts in compliance with applicable substantive and procedural standards. None of those conditions are satisfied here.

II. NO NEW FACTS ARE SUGGESTED BY THE RESPONDENT TENDING TO SHOW CONCERN OR INTEREST ABOUT THE PROGRAM BY THE MPSC.

Respondent still has not come forward with any argument to rebut Petitioner's claim that no aspects of the light bulb distribution program, including among others, very important facets of the program, such as, number, kind of bulbs available, and methods of distribution are regulated.[5]

Obviously recognizing that it had no basis in fact to meet the tests set forth in *Parker* v. *Brown,* Edison developed a novel theory that at one and the same time is facile and transparent. Edison argues that its customers derive "clear benefit" (R.B. 40) from the program. It follows, Edison argues:

1. That the consumer would be hurt by elimination of the program (R.B. 44, 45);

2. That the MPSC should be commended, not faulted, for not wasting its limited resources investigating a program about which there was such universal joy (R.B. 40, 41);

---

[5] Indeed, a careful analysis of the lamp program description in the rate schedule shows that most of the obligations imposed on Edison are illusory. Stripped of its verbiage, Edison can comply by giving out only enough bulbs to fill the permanent fixtures of new homes. Edison could, if it wished, require proof of the proportion of electricity used by a customer for light as opposed to use for other purposes, a proof which customers could not provide because Edison's meters cannot provide such information. Moreover, Edison could cease to offer bulbs at service centers and agencies and still be in compliance. So much for Edison's obligation and with it state compulsion.

3. That state regulation and the antitrust laws have the same goal—efficient resource distribution—and that somehow by permitting distribution of cheap bulbs the MPSC promotes the ends sought by antitrust enforcement.

Two things are wrong with Edison's approach here. Its argument is immaterial[6] and the "facts" concerning benefit are for the most part either erroneous, half-truths, unwarranted speculation or a combination of all three. They have no place in this proceeding.

A discussion of Edison's purported facts of "clear benefit" is warranted here if for no other reason than to demonstrate the weakness of Edison's case and the lengths to which it has gone to avoid meeting the issues which the Petitioner has raised. Edison asserts that its customers will lose some $3,000,000 per year if the program ceases (R.B. 45). Edison's clairvoyance is amazing, for how is it to know what effect elimination of the program will have on both the electricity rate and use. If, as Edison contends, bulbs will be more expensive presumably less will be sold and less electricity used. How can Edison estimate its cost savings and thus the rate reduction effect

[6] The object of the Sherman Act is to promote competition and improve resource allocation. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 255 F. 2d 214 (9th Cir. 1958) rev'd on other grounds, 359 U.S. 207; *In re*: *Multidistrict Vehicle Air Pollution*, 367 F. Supp. 1298 (D.C. Cal. 1973). That Edison's customers may be getting a good deal on bulbs proves nothing. In fact, it can be assumed that the availability of "cheap bulbs" results in the production and distribution of more light bulbs and electricity than would be the case if free competition in light bulb sales were allowed to occur. Indeed, there is evidence on the record that the object and effect of Edison's program results in just that kind of resource misallocation (26a, 29a, 163a, 292a).

when it hasn't bothered to compute the cost of service centers and agencies that should be, but has not been, allocated to the program.[7] (102a, 103a, 104a). Edison without factual basis in the record assumes a 50% markup by Plaintiff and other retailers despite clear evidence that such is not the case (see Appendix 69a, 70a where Plaintiff says he tries to get 30% to 35% markup). Regardless, it is not possible to determine what the free flow of the market place will do to bulb quantities sold, quality available and prices if Edison's program is stopped.[8]

Edison was apparently not satisfied to engage in this misleading flight of economic fancy and invention. Edison made an injudicious attempt to subvert the record by (1) alleging as fact the presumed statement of a witness which the court below was willing to listen to over Petitioner's objection, but which Edison chose not to offer at the hearing (appendix 173a, 174a, 189a), (2) claiming that no customers have complained of the program when their own answer to Petitioner's interrogatories disclose the pendency of a consumer class action in the state courts in Detroit attacking the program (39a), (see p. 1a of appendix hereto) and (3) set forth in the appendix to its Brief an undated, unsigned, unsworn, uncertified excerpt

[7] Edison's own survey prepared in 1970 shows the principal use of service centers is for the light bulb "exchange" (R.B. 29, 3a). Presumably, the cost associated with these centers and agencies could be substantially reduced and with it the cost of electricity if the program ceased.

[8] Also, Respondent persists in its Brief that it makes no profit on its light bulbs yet it admits that a portion of its working capital needs (including presumably the cost of light bulbs) is made a part of its rate base (97a, 102a) upon which it earned "a rate of return". Additionally, investment in service centers used to distribute light bulbs also is presumably a part of rate base.

from a transcript which had previously not been made available to Petitioner in this case despite Petitioner's repeated requests during depositions for any evidence of proceedings including testimony before the MPSC or any other regulatory agency regarding light bulbs.[9]

Respondent's cases, by way of contrast, highlight the absence of regulatory activity and concern in this case.

In *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975), the S.E.C. was given specific statutory authority over commission rates. The MPSC has no such authority with respect to light bulbs. In *Gordon* the Supreme Court took notice of the ample evidence of formal and informal studies and consideration given by Congress and the S.E.C. to fixed commission rate arrangements. There was no such consideration in the instant case.

In *Jeffrey* v. *Southwestern Bell,* 518 F. 2d 1129 (5th Circuit 1975), Plaintiff consumers were not permitted to attack a rate under the guise of a federal antitrust claim, in part, because these same consumers, represented by counsel had fought the rate before the rate making body. Demonstrated regulatory consideration—of the kind that is so obviously missing in the instant case—support the result also in *Gas Light Co. of Columbus* v. *Georgia Power Company,* 440 F. 2d 1135 (5th Circuit 1971), cert. denied 404 U.S. 1062 (1972). In *Georgia Power* the Court said in protecting certain anticompetitive practices which were included in the defendant's tariff:

[9] Petitioner is frankly outraged by this eleventh hour attempt to cloud the issues. However, the transcript of testimony (R.B. Appendix 1b), if it does anything, demonstrates the blatant openness with which Edison at will modified the program without either supervision or approval let alone command of the MPSC.

> "As we have seen above, the Commission here gave lengthy consideration to each of the practices and rates under attack, and later full adversary hearings ordered them into effect, some with major modifications." 440 F. 2d 1135, 1140

In *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Company of Virginia,* 480 F. 2d 754, 756 (4th Circuit 1973) an antitrust exemption was allowed upon evievidence that the plaintiffs were represented by counsel and participated in public hearings of the regulatory commission at which the practices under attack were approved. 480 F. 2d 754, 756-7.[10]

[10] In *Business Aides,* reference to the adversarial hearings before the commission is admittedly *dicta.* The exemption was allowed not because the regulatory agency considered the practice attacked, but because the defendants ". . . actions were occasioned by adherence to the rules and regulations of its operative tariff. . ." 480 F. 2d 754, 756. It is this holding which the District court in the instant case adopted as controlling and from which the Petitioner has appealed. Another Court of Appeals opinion coming from the same circuit as *Business Aides* and which deals with the shielding of anticompetitive practices with a state action exemption is *Washington Gas Light Co.* v. *Virginia Electric and Power Co.,* 438 F. 2d 248 (4th Circuit 1971), the so-called "VEPCO" decision. VEPCO extended antitrust exemption to an anticompetitive practice merely because the state had authority, although unexercised, to stop the practice. The VEPCO decision has been much criticized. See, *Norman's On the Waterfront, Inc.* v. *Wheatly,* 444 F. 2d 1011, 1018 (3rd Circuit 1971). Note, *Parker* v. *Brown Gone to Hecht: A New Test For State Action Exemptions,* 24 Hastings Law Journal, 287, 306 (1973), *Recent Cases, State Action Exemption,* 85 Harvard Law Review, 670 (1972), and now, given this Court's decision in *Goldfarb* v. *Virginia State Bar Association,* 95 S.Ct. 2004 (1975, would appear no longer to have any force.

III. RESORT TO THE MPSC SERVES NO USEFUL PURPOSE.

Respondent has suggested, at great length, that the proper forum for determining the question before this Court is the Michigan Public Service Commission. The issue before this Court is whether or not the activities of the Michigan Public Service Commission with respect to Detroit Edison's lamp distribution program constitutes state action within the meaning of *Parker* v. *Brown*. Petitioner submits this is an issue for judicial and not regulatory determination. Furthermore, it seems peculiar that at this late stage Respondent, after being twice successful in the federal courts on the issue which it raised, should seek to avoid the antitrust court's determination of the matter.

Regardless, certain fundamental conditions of law and fact in this case preclude a resort to the MPSC.

1. As Petitioner has repeatedly argued, the MPSC lacks statutory authority to authorize continuance or discontinuance of the light bulb program. The limited authority of the MPSC has been clearly decided by the Michigan Supreme Court. *Huron Portland Cement Co.* v. *Public Service Commission,* 351 Mich. 255, 88 N.W. 2d 492 (1958); see also *Detroit Edison* v. *City of Wixom,* 10 Mich. App. 218, 159 N.W. 2d 230 (1968), rev'd on other grounds 382 Mich. 673. No purpose is served therefore in sending the matter back to the MPSC for a determination of its authority except perhaps to frustrate Petitioner's antitrust rights.

2. A pure and simple antitrust action has been brought by the Plaintiff, a competitor of Detroit Edison, not a consumer of its services. Sending the Petitioner back to the MPSC precludes Petitioner from having his antitrust claim adjudicated and obtaining appropriate relief.

A. The MPSC's predecessor agency has disclaimed jurisdiction to make an antitrust inquiry. *McCrea* v. *Detroit Gas Co.,* 24 P.U.R. (N.S.) 225, 227 (Michigan Public Utilities Commission, 1938). In 1937 the Wayne County, Michigan Prosecuting Attorney petitioned the Michigan Public Utilities Commission to investigate schemes pursuant to which existing gas rates had been established, as well as the effect of the monopolistic gas interests upon the price of natural gas to Michigan customers. The Public Utilities Commission did have authority over gas rates which was comparable to its authority over electric rates (see MCLA 460.54) and the rates which were the subject of the Petition presumably had previously been approved by the Commission. Nonetheless, the Commission stated:

> "That it is without jurisdiction to investigate the acts, practices, devices, and schemes under which the present rates were established, in order to consider and report how such evils may be remedied, and to investigate, report, and act in respect to the control and domination of monopolistic gas interests over the markets in the State of Michigan, and the effect thereof in enhancing the price of natural gas to Michigan customers." *McCrea* v. *Detroit Gas Co., supra.*

The basic regulatory authority of the MPSC is the same as its predecessor, the Michigan Public Utilities Commission, no more, no less. MCLA 460.4; *Huron Portland Cement Co.* v. *Public Service Commission,* 351 Mich. 255, 264; 88 N.W. 2d 492, 497 (1958). Therefore, if this case were returned to the Commission, the Commission following its own precedent would put the Petitioner back in the federal court.

B. The MPSC can only act prospectively. It cannot give damages for a business tort. Whatever relief it is that

the Respondent envisions Petitioner obtaining from the Commission it is at least clear that the MPSC only acts prospectively and cannot provide Petitioner with the monetary relief obtainable in an antitrust action in the federal court. *Muskegon Agency, Inc.* v. *General Telephone Company of Michigan,* 340 Mich. 472, 482 (1954), 65 N.W. 2d 748, 753, *Valentine* v. *Michigan Bell Telephone Company,* 388 Mich. 19, 30 (1972), 199 N.W. 2d 182; *Michigan Bell Telephone Company* v. *Michigan Public Service Commission,* 315 Mich. 533, 546, 547, 24 N.W. 2d 200, 205, 206 (1946).

C. Resort to the MPSC denies Petitioner of a proper forum.

The MPSC lacks the legal expertise necessary to adjudicate claims of violation of the federal antitrust laws (see 2A above). The MPSC cannot provide the Petitioner with a jury trial; nor are traditional means of discovery available. Furthermore, even if Petitioner was successful in obtaining whatever relief Edison asserts Petitioner may be entitled to, Edison could simply appeal that decision and the case ultimately would require a judicial determination (see discussion *infra* p. 14, of Mr. Justice Marshall's concerns for judicial economy). It is well known that the federal antitrust courts are the repository of expertise when it comes to antitrust claims.

3. In the sense that the term is used in MCLA 460.551 etc., Petitioner's action attacks neither the "rate" nor the reasonableness of the rate approved by the Michigan Public Service Commission nor the conditions of service under which electricity is tranmitted or distributed (MCLA 460.551). The decision of the Supreme Court of Michigan in *Valentine* v. *Michigan Bell Telephone Company,* 388 Mich. 19, 199 N.W. 2d 182 (1972), demonstrates that causes of action sounding in tort for damages against

utilities, while they may touch upon rates, are nevertheless maintainable in courts of general jurisdiction. It is clear that the mere fact that a rate or rate schedule may be tangentially involved in litigation is not sufficient to oust a court of competent jurisdiction from hearing the claim recognizable in law which could grant Plaintiff the relief sought.

4. Respondent places principal reliance upon *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973) for the proposition that this case should be dismissed and Petitioner seek relief before the MPSC. Respondent's reliance on *Ricci* is misplaced. In *Ricci* a trader on the Chicago Mercantile Exchange filed an antitrust action claiming that his seat was transferred contrary to a membership rule adopted by the Exchange. The rule had been approved by the Commodity Exchange Commission pursuant to the Commodities Exchange Act. Justice White, writing for a 5 to 4 majority directed the district court to retain jurisdiction for purposes of determining the antitrust question, but only after the Commission had considered plaintiffs' claims that the Exchange rule was improper or had not been followed. Justice White, recognizing the force of the dissents made clear that the decision was a limited one. Exchange membership requirements, Exchange operations and Exchange adjudication procedures were in issue. It was to obtain the Commission's expertise in resolving those questions that this case was sent to the Commission. Justice White said:

> "We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership

> rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and exchange rules." 409 U.S. at p. 307.

No one here has questioned whether Edison is complying with its rate schedules, nor is there any material question of fact here relating to what the MPSC did or did not do. (We must assume that by this time the Respondent has produced its best evidence of MPSC activity). Nor does it seem that the MPSC can shed any additional light on its own authority given the extent to which its authority has already been examined by the courts.

The conduct of the Respondent which Petitioner claims is anticompetitive is well known and admitted. The legal effect of that conduct can be assessed by well established judicial precedents.

These distinctions make the dissenters' comments in *Ricci* especially compelling here against Respondent's claim that the MPSC may shed some light on the issues in this case (R.B. 55). Mr. Juctice Marshall said in response to just such a claim:

> "I had not thought that petitioner need meet the burden of showing that resort to administrative remedies would be totally useless before securing adjudication from a court. Indeed, in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity. But we have never suggested that such suits must therefore invariably be postponed while the agency is consulted. . . . On the contrary, in these days of crowded dockets and long court delays, the doctrine frequently prolongs and complicates litigation. More fundamentally, invocation

> of the doctrine derogates from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindication of his legal claims of right. . . This principle is especially worthy of protection in the antitrust field where it is unmistakably clear that Congress has given courts, rather than agencies, the primary duty to act. Cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 487-490 (1962)." 409 U.S. at p. 320.

Ricci is further distinguishable in that at least there the rule of the Exchange was to be reviewed by an independent body. Respondent here is asking the MPSC to consider in quasi-judicial capacity a practice which it allowed in its quasi-legislative capacity. This cannot and should not be the law. Cf. *Arizona Grocery* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 389 (1932).

5. Respondent is not here asking the Court to invoke the doctrine of primary jurisdiction. Primary jurisdiction allows a court while retaining jurisdiction of the main action, to require the parties to obtain a determination of some subsidiary question which lays within expert province of an administrative agency. *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Macom Products Corp.* v. *American Telephone & Telegraph Co.*, 359 F. Supp. 973 (C.D. Cal. 1973); Davis, *Administrative Law Text*, 1959, p. 344 *et seq.* Respondent wants the case dismissed (R.B. 54). Respondent is not seeking to invoke the doctrine of exhaustion here—though they occasionally use that term (R.B. 60). The doctrine of exhaustion can be used when the matter in issue is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief. *Davis, supra*, p. 356. As indicated, the MPSC is not able to provide Petitioner with the relief afforded by the antitrust laws.

So, what is it Respondent is asking this Court to do? First, it appears Respondent is asking the Court to extend the doctrine of *Parker* v. *Brown* to every activity of a public utility taken under color of an approved tariff or rate schedule without regard to the authority of the supervising agency or the degree of regulatory consideration given to the practice. Petitioner has amply demonstrated this should not be the law.

Alternatively, it appears the Respondent, wholly apart from the Court's determination of the *Parker* v. *Brown* issue, is asking for a new rule of law applicable only to public utilities sued for antitrust violations, i.e., that when the activity attacked is engaged in under color of an approved tariff or rate schedule resort should first be had to the "approving" regulatory agency before coming into federal court, regardless of the authority of the agency, its procedures, the posture which the claimant must assume, the lack of adequate relief and the existing expertise of the federal courts. Applying such a rule and assuming the claimant obtained a favorable prospective result, he would still have to go to federal court to prove his liability under antitrust standards and to prove his damages. Lack of success in such a procedure would likewise not prevent him from coming to court. In short, Respondent's suggestions accomplish nothing except to frustrate and delay the Petitioner and the judicial process.

CONCLUSION

Respondent has not provided the Court with the basis for affirming the decisions below.

Respectfully submitted,

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APPENDIX

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE

CHARLES GILL, RONALD PIGEON, THERESA QUICKSEY, and JUDITH SPIVEY,

Plaintiffs,

vs.

THE DETROIT EDISON COMPANY,
a Michigan corporation,

Defendant.

Civil Action No. 73-230257

CLASS ACTION
COMPLAINT FOR A DECLARATION OF RIGHTS AND OTHER APPROPRIATE RELIEF

COUNT I

Charles Gill, Ronald Pigeon, Theresa Quicksey, and Judith Spivey (hereinafter referred to as Plaintiffs), individually and in a representative capacity on behalf of all other family-situated Domestic Service Rate customers of Detroit Edison Company (hereinafter referred to as Detroit Edison) by their attorneys, Lopatin, Miller, Bindes & Freedman, complain of Detroit Edison as follows:

1. At the present time, and for many years previously, defendant, Detroit Edison, has done business in Michigan and has had its principal place of business in Detroit, Michigan.

2. Now, and at all pertinent times, defendant Detroit Edison has been engaged in selling electrical energy to Michigan Domestic Service Rate customers.

3. Now, and at all pertinent times, plaintiffs have been Domestic Service Rate customers of Detroit Edison.

4. During this period, plaintiffs have not known of or utilized defendant Detroit Edison's Lamp Supply Service or Appliance Repair Service.

5. Plaintiffs are informed, and on such information and belief allege the fact to be, that plaintiffs and other Detroit Edison Domestic Service Rate customers have been secretly charged for Lamp Supply Service and Appliance Repair Service through monthly charges imposed by defendant Detroit Edison, regardless of plaintiffs' and other Domestic Service Rate customers' lack of use of these services and notwithstanding defendant Detroit Edison's failure to inform plaintiff and other Domestic Service Rate customers that charges would be imposed whether or not the services were utilized.

6. Not only has defendant Detroit Edison failed to inform its Domestic Service Rate customers of the secret charges imposed for Lamp Supply Service and Appliance Repair Service, but defendant Detroit Edison wrongfully has advertised these services to be "extra" and "no charge". See plaintiffs' Exhibit A annexed hereto.

7. Plaintiffs are informed, and on such information and belief allege the fact to be, that defendant Detroit Edison's failure to inform plaintiffs and other Domestic Service Rate customers of the imposition of monthly charges for Lamp Supply and Appliance Repair Service regardless of lack of utilization of these services, as well as defendant Detroit Edison's wrongful misrepresentations that Lamp Supply Service and Appliance Repair Service are "extra" and "no charge" have not been authorized or approved by the Michigan Public Service Commission.

8. Defendant Detroit Edison's failure to inform plaintiffs and other Domestic Service Rate customers of the imposition of monthly charges for Lamp Supply Service and Appliance Repair Service regardless of lack of

utilization of these services and defendant Detroit Edison's wrongful misrepresentations that Lamp Supply Service and Appliance Repair Service are "extra" and "no charge" constitute conduct inconsistent with a public utility's obligation to advise its customers of material facts pertaining to the public utility's mode of operation.

9. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service, an Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and who have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before this Court, that the plaintiffs fairly and adequately represent this class, and that the plaintiff may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court impress a constructive trust on all collections of charges for Lamp Supply Service and Appliance Repair Service from plaintiffs and other Domestic Service Rate customers similarly situated who have not been informed that these charges would be collected regardless of their degree of utilization of these services; and

7. that plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT II

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count 1, as Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count II, as if fully set forth.

8. Plaintiffs and other Domestic Service Rate customers neither expressly nor impliedly have assented to defendant Detroit Edison's secret imposition of charges for Lamp Supply Service and Appliance Repair Service, which services they have not utilized to an extent which

is commensurate with the monthly charges collected for these services, and where services have been advertised as "extra" and involving "no charge."

9. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore, plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the plaintiffs fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply

Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court declare that defendant Detroit Edison has been unjustly enriched by the secret collection of charges for Lamp Supply Service and Appliance Repair Service from plaintiffs and all other Domestic Service Rate customers who never have been informed that these charges would be imposed regardless of their utilization of these services and award damages for this unjust enrichment; and

7. that plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT III

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count I, as Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count III as if fully set forth.

8. Plaintiffs and all other Domestic Service Rate customers have had their property subjected to defendant Detroit Edison's dominion and control without their consent by virtue of defendant's secret imposition of charges for Lamp Supply Service and Appliance Repair Service, which services plaintiffs and other Domestic Service Rate

customers have not used to an extent which is commensurate with the monthly charges collected for these services and which services have been advertised as "extra" and involving "no charge."

9. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the Courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the plaintiffs fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as extra and involving "no charge";

6. that the Court declare that defendant Detroit Edison has unlawfully converted the property of plaintiffs and all other Domestic Service Rate customers through the secret collection and misappropriation of charges for Lamp Supply Service and Appliance Repair Service which the plaintiffs and other Domestic Service Rate customers have not used and award damages for this conversion; and

7. that plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT IV

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count I, as Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count IV, as if fully set forth.

8. At all pertinent times there was, and is, in full force and effect, a statute of the State of Michigan, designated as Mich. Comp. Laws § 750.33. This statute provides as follows:

> Any person, who with intent to sell, purchase or in anywise dispose of or acquire merchandise, securities, service or anything offered or sought by such person, directly or indirectly, or to from the public for sale, purchase or distribution, or with intent to create the consumption thereof, or to induce the public in any manner to enter into any obligation thereto or any interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes directly or indirectly to be made, published, disseminated, circulated, or placed before or communicated to the public in this state . . . in advertisement of any sort of regarding merchandise, securities, service or anything so offered to or sought from the public, or regarding the motive or purposes of a sale, purchase, distribution or acquisition which advertisement contains any assertion, representation, or statement or illustration, including statements of present or former sale price or value, which is untrue, deceptive, or misleading, or calculated to subject any person to disadvantage or injury through the publication of false or deceptive statements . . . shall be guilty of a misdemeanor. . . .

9. The course of conduct alleged in Paragraphs 1, 2, 3, 4, 5, 6, and 7 includes untrue, deceptive, and misleading assertions, representations, and statements concerning present price made with intent to sell electrical energy and calculated to subject to injury plaintiffs and all other Domestic Service Rate customers who have not utilized Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services in that:

A. Plaintiffs and other Domestic Rate Service customers have been charged secretly for the benefits of Lamp Supply Service and Appliance Repair Service on a monthly basis;

B. Yet, plaintiffs and other Domestic Rate Service customers never have been informed that these

charges would be imposed regardless of their lack of utilization of these services.

10. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the Plaintiffs fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that this Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply

Services and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court declare that defendant Detroit Edison has violated Mich. Comp. Laws § 750.33 and award damages to plaintiffs and other Domestic Service Rate customers; and

7. that Plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT V

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count I, as Paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count V, as if fully set forth.

8. Since March 10, 1967, there have been, and are, in full force and effect, certain statutes of the State of Michigan designated as Mich. Comp. Laws §§ 445.801-.809. These statutes provide as follows:

> Section 445.801.
>
> It shall be unlawful for any person knowingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive, or misleading. . . .

Section 445.803.

In determining whether or not advertising is deceptive or misleading, there shall be taken into account, in addition to the above, the extent to which the adveristising fails to reveal facts material in the light of representations made or suggested in a positive manner.

9. The course of conduct alleged in Paragraphs 1, 2, 3, 5, 6 and 7 has been knowingly engaged in by defendant Detroit Edison and involves statements, representations, and nondisclosures which are untrue, deceptive, and misleading in that:

A. Plaintiffs and other Domestic Service Rate customers are charged secretly for the benefits of Lamp Supply Service and Appliance Repair Service on a monthly basis;

B. Yet, plaintiffs and other Domestic Service Rate customers never have been informed that these charges would be imposed regardless of their utilization of these services and defendant Detroit Edison has advertised these services as "extra" and "no charge."

10. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardships to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the plaintiff fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court declare that defendant Detroit Edison has violated Mich. Comp. Laws §§ 445.801, 445.803 and award damages to plaintiffs and other Domestic Service Rate customers; and

7. that Plaintiffs be awarded reasonable attorney's fee and costs, and any other relief that the Court may deem just and equitable.

LOPATIN, MILLER, BINDES & FREEMAN

By /s/ Sheldon L. Miller
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Dated: February 20, 1973.

Supreme Court, U. S.
FILED
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No. 75-122

In the Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR, PETITIONER

v.

THE DETROIT EDISON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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No. 75-122

LAWRENCE CANTOR, PETITIONER

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THE DETROIT EDISON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the antitrust laws. Applications of those laws often relate to anticompetitive practices of firms subject to various forms of state regulation. The claim frequently is made that those practices have been approved by the state and therefore are exempt from the antitrust laws under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341.

The conduct that is the subject of the present antitrust challenge is a public utility's practice, set out in a provision of a general tariff which the state regulatory commission has approved, in circumstances where there is no state regulatory scheme or policy which affirmatively requires or favors the practice. The United States has a significant interest in the question whether such state approval is sufficient to exempt the practice from the antitrust laws.

STATEMENT

Petitioner Cantor is a proprietor of a drugstore in Detroit, Michigan (App. 4a). In 1973, he filed in the United States District Court for the Eastern District of Michigan, a civil antitrust suit against respondent Detroit Edison Company seeking treble damages and injunctive relief (App. 2a-8a). Since 1886, more than 20 years prior to Michigan's first regulation of the sale of electricity, Detroit Edison and its predecessor have followed the practice of charging its customers a single rate under which it supplies both electricity and light bulbs (App. 26a). The complaint alleges that this practice constituted an attempt to monopolize and a monopolization of the sale of light bulbs in the territory Detroit Edison serves, in violation of Section 2 of the Sherman Act (App. 5a-6a), and an illegal tying arrangement, in violation of Section 3 of the Clayton Act (App. 7a).

Detroit Edison moved for summary judgment, on the ground that its "lamp exchange" program had been approved by the Michigan Public Service Commission as a part of the general tariffs filed with that agency (App. 24a, 26a). The district court granted the motion, ruling that "[w]hen a state agency acts affirmatively in approving rates and practices of a utility, there is no antitrust liability" (App. 58a). The court stated (App. 59a):

> [I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.

The court also noted that the Public Service Commission has "continuing jurisdiction" to supervise the rates, service and operation of electrical utilities and concluded that "the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine" (*ibid.*).

The United States Court of Appeals for the Sixth Circuit affirmed *per curiam* (App. 62a). It stated that "the district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing su-

pervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown* * * *" (*ibid.*).

SUMMARY OF ARGUMENT

Parker v. *Brown*, 317 U.S. 341, was the origin of the rule that the antitrust laws do not apply to "private" anticompetitive conduct that a state has compelled. The Court there distinguished between anticompetitive conduct that the state required as part of a deliberate state regulatory policy and program, which is exempt from the antitrust laws as "state action," and conduct that the state has merely authorized, which is not exempt. Unless the anticompetitive conduct is "required" or "compelled" by the state, it is subject to the Sherman Act; the "state action" exemption is not available if the "anticompetitive conduct is 'prompted' by state action." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790, 791. See, also, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 354-357.

Under these principles, Detroit Edison's lamp exchange program is not exempt from the antitrust laws. The utility's policy of selling electricity and bulbs in a single package is a voluntary practice; neither the state nor the Michigan Public Service Commission has any special policy favoring the practice. Although the Commission conducted an investigation of the utility's general tariff, which included the provision for the bulb exchange program, there is no indication that this investigation specifically

considered the practice or its effect upon competition in the sale of light bulbs. The fact that the Commission's approval of the tariff apparently took the procedural form of an "order" did not convert all the provisions of the general tariffs into state-mandated action for antitrust purposes.

ARGUMENT

The complaint in this case alleged that Detroit Edison's practice of tying the sale of electricity to the sale of light bulbs constituted an illegal attempt to monopolize and monopolization of the sale of light bulbs in the areas which Detroit Edison serves (where it has a monopoly of the business of supplying electricity), in violation of Section 2 of the Sherman Act, and an illegal tying arrangement, in violation of Section 3 of the Clayton Act. These allegations state a cause of action for violation of the antitrust laws, and the complaint ordinarily would not be subject to dismissal without a trial. Cf. *Times-Picayune* v. *United States*, 345 U.S. 594; *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1; *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571, 576; *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464. The question here is whether the practice is immune from antitrust liability because it is reflected in a general tariff which the Michigan Public Service Commission has approved. The United States submits that under the decisions of this Court dealing with the "state action" exemption from the antitrust

laws, the approval by the Michigan Commission of Detroit Edison's general tariff which contains a provision covering the lamp exchange program does not immunize the practice from the antitrust laws.

I.

PRIVATE ANTICOMPETITIVE CONDUCT THAT THE STATE HAS APPROVED, BUT HAS NOT REQUIRED AS PART OF A REGULATORY PROGRAM, IS NOT EXEMPT FROM THE ANTITRUST LAWS UNDER THE STATE ACTION DOCTRINE OF *PARKER* v. *BROWN*, 317 U.S. 341.

The principle that the antitrust laws do not apply to "private" anticompetitive conduct compelled by the state had its origin in *Parker* v. *Brown, supra.* That case involved a private antitrust suit challenging the California raisin marketing program, which the state had adopted to restrict competition and maintain prices (317 U.S. at 346). Under the program, producers could petition for a marketing plan and, following approval by a state agency and consent by a majority of the producers in the area, the plan became effective. The raisin marketing plan imposed various limitations upon the production and marketing of raisins, and there were criminal penalties for violations. The program was challenged as violating the Sherman Act in a suit for an injunction brought by a producer and packer of raisins in California, who alleged that it would unreasonably restrain his trade in raisins.

The Court held that the marketing program did not violate the Sherman Act. Although it ruled that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it" (317 U.S. at 351), it held that the program was state and not private action. "Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. * * * The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application" (317 U.S. at 352).

The Court stated that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" (317 U.S. at 350-351). It concluded (317 U.S. at 352):

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

Subsequent decisions of this Court have reiterated the distinction drawn in *Parker* that the "state ac-

tion" exemption applies only where the state compels the anticompetitive conduct and not where it merely authorizes or approves such conduct. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, the Court rejected a private party's claim that its status as exclusive purchasing agent for the Canadian government brought it within the *Parker* exemption, because there was no indication that any Canadian government official had "directed" the defendant to engage in the anticompetitive conduct (*id.* at 706) or that Canadian law "compelled" such conduct (*id.* at 707). More recently, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, the Court stated (p. 791): "It is not enough that * * * anticompetitive conduct is 'prompted' by state action." Instead, it reiterated that private conduct takes on the character of "state action," with its concomitant antitrust exemption, only when "the activity is required by the State acting as sovereign" or "compelled by direction of the state acting as a sovereign" (421 U.S. at 790, 791).

The Court faced a similar issue, and reached a similar conclusion, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345. The question in that case was whether a public utility's termination of electric service, pursuant to a general tariff filed with and approved by the state public utility commission, was state action under the Civil Rights Act (42 U.S.C. 1983). In holding that the utility's private action in terminating service was not transmuted into state

action merely "because the State 'has specifically authorized and approved' the termination practice" (p. 354), the Court stated (p. 357; footnote omitted):

> Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

The basic rationale of *Parker* v. *Brown* and the cases following it requires, we submit, that for private anticompetitive conduct to be state action and therefore immune from the antitrust laws, it must be conduct that the state affirmatively has required as part of a deliberate state regulatory policy or program. The California marketing program which was held to constitute state action in *Parker* represented a deliberate state decision to substitute state regulation for the normal free play of competition which the Sherman Act is designed to protect. The Court in *Parker* repeatedly pointed out that the action there challenged was required by the state as a matter of "command" and "governmental policy" (317 U.S. at 350, 352).[1]

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[1] Consistent with this analysis, a number of federal courts have held that private anticompetitive conduct that the state has approved or acquiesced in, but has not directed as part of a deliberate state policy, is not state action that is immune from the antitrust laws. See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (C.A. 1), certiorari denied, 400 U.S. 850; *United States* v. *Pacific Southwest Airlines*, 358 F. Supp. 1224, 1226-1227 (C.D. Cal.),

As we now show, Detroit Edison's lamp exchange program is not compelled by the state as a matter of governmental policy and therefore is not exempt from the antitrust laws.

II.

THE MICHIGAN PUBLIC SERVICE COMMISSION'S APPROVAL OF DETROIT EDISON'S GENERAL TARIFF WHICH CONTAINS A PROVISION COVERING ITS BULB EXCHANGE PROGRAM DOES NOT MAKE THE PROGRAM STATE ACTION WHICH IS IMMUNE FROM THE ANTITRUST LAWS.

Unlike the raisin marketing program in *Parker* v. *Brown*, which reflected "the legislative command of the state" (317 U.S. at 350), Detroit Edison's policy of selling electricity and bulbs in a single package is a wholly voluntary practice as to which the state has no special policy. There is no Michigan statute which either requires or favors the practice. The Michigan legislature has never displayed any interest in the manner in which light bulbs are sold in the state. Similarly, the Michigan Public Service Commission apparently has no policy that either favors or opposes—let alone compels—the program.

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certiorari dismissed, 414 U.S. 801; *Travelers Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 298 F. Supp. 1109, 1112 (W.D. Pa.); *Marnell* v. *United Parcel Service*, 260 F. Supp. 391 (N.D. Cal.). The Fourth Circuit, however, has taken the contrary view. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248; *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Co. of Virginia*, 480 F.2d 754; *Goldfarb* v. *Virginia State Bar*, 497 F.2d 1, reversed and remanded, 421 U.S. 773.

Indeed, that agency apparently has approved tariffs of other utilities that do not have a lamp exchange program (App. 51a).

The sole basis upon which the district court ruled that Detroit Edison's lamp exchange program constitutes state action was that, after conducting its own investigation and hearings, "the Commission ordered specific tariffs" (App. 59a).[2] There is nothing to indicate, however, that this tariff investigation focused upon the utility's practice of combining the sale of electricity and light bulbs (App. 50a-52a, 126a, 132a, 156a-160a, 164a), or the effect of the combined sale policy upon competition in the sale of light bulbs (App. 157a). The situation thus apparently parallels that in *Jackson*, where the state regulatory commission carefully scrutinized the rate portions of the tariff but did not specifically consider the provision that was challenged under the Civil Rights Act (419 U.S. at 354-355).

The Michigan Commission's indirect authorization of the practice, resulting from its approval of the general tariff, was not state action in the *Parker* sense of constituting a command of the state, made in the execution of a state policy, which Detroit Edison was required to obey. To the contrary, respondent merely "exercise[d] * * * the choice allowed by state law [of including the lamp exchange pro-

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[2] Although the Commission's order is not a part of the record, it may have amounted to no more than an order that "approved" the general tariff (see App. 334a, 339a).

vision in the tariff] where the initiative comes from it and not from the State" (*Jackson*, *supra*, 419 U.S. at 357). That is not enough to make it state action under the *Parker* doctrine.

The fact that the Michigan Commission's approval of the tariff apparently took the procedural form of an "order" does not convert all the provisions of the general tariff into mandated state action for antitrust purposes. The critical inquiry in determining whether private anticompetitive conduct can be justified as state action is the nature of the state's involvement in approving the practice and not the form such approval takes.

Where, as in *Parker*, the state's involvement reflected a deliberate mandatory state policy and implementation of the program by state officials, it was state action without regard to whether the state merely approved the program or affirmatively ordered it into effect. Here, on the other hand, the fact that the state commission's approval of the tariff is cast in the form of an "order" does not transmute Detroit Edison's private practice into state action, since the program is not conducted pursuant to any affirmative state program or policy that requires it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
individually and on behalf of all other
retail sellers of light bulbs
similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY,
a New York Corportion,

Respondent.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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Supreme Court of the United States

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No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
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Petitioner,

vs.

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Respondent.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above-entitled cause. In support of such motion, the NARUC shows:

Consent to the filing of a brief in this cause by NARUC was granted by attorneys for repondent Detroit Edison Company. Consent of petitioner Lawrence Cantor has been refused.

The NARUC is a quasi governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, including the Michigan Public Service Commission, and the governmental agencies of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials charged with the duty of regulating privately-owned electric utilities within their respective States to assure the establishment and maintenance of utility services and facilities that may be required by the public convenience and necessity, and to assure the furnishing of service at rates that are just and reasonable.

This case is before the Court on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The action was originally instituted in the District Court for the Eastern District of Michigan by Cantor, who sought treble damages and injunctive relief under Federal antitrust laws for the continuation by Detroit Edison of a lamp exchange program which has been, for many years, an integral part of the services provided by Edison under rates approved by the Michigan Public Service Commission (MPSC). The District Court granted Edison's Motion for Summary Judgment on the basis of the State action exemption to Federal antitrust laws pursuant to this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943). On appeal, the District Court's decision was affirmed.

The State governmental regulators who are members of the NARUC have a vital and direct interest in the disposition of this case. The record here shows that the Michigan Public Service Commission approved tariffs filed by Detroit Edison, a regulated electric utility, under which Detroit Edison provides its customers various types of incandescent lamps as a part of basic electric power service. Under Michigan law, such approval

rests upon a determination by the Michigan Commission that the rates and services to be provided thereunder are reasonable, non-discriminatory, and required in the public interest. Hence, this case amounts to a direct attack upon the rates and rate structures of a regulated public utility.

A public utility's rates and services are complex products of the history of past regulatory actions and decisions. Such decisions have historically been entrusted to State regulatory commissions subject, of course, to judicial review.

Petitioner's complaint is apparently based on the theory that if competitive injury has resulted from a State commission determination, then such injured party can simply race to the Federal courts to have the injury corrected on the basis of the Federal antitrust laws. Such a theory plainly threatens the entire structure prescribed by the State of Michigan for regulating the conduct and activities of a public utility.

Nor is the threat posed to State regulatory jurisdiction by petitioner's theory limited to Michigan. The statutory structure through which Michigan has sought to regulate public utilities does not differ substantially from that in effect in other States. Hence, the question presented in this appeal has a significance that extends beyond the interests of the private parties directly involved, and beyond the narrow question of the reasonableness or unreasonableness of the light bulb plan.

It is this threat to the integrity of State regulatory jurisdiction and the process whereby such jurisdiction is exercised which are of prime interest to NARUC in this case. The judicial landmark to be established by the Court in the disposition of this case will have a direct impact on the ability of State authorities to discharge their responsibilities on behalf of the people within their respective jurisdictions. This Court's affirmance of the lower Court's decision is necessary to avoid serious dilution of the State's responsibilities and capacities in the area of public utility regulation.

Wherefore, it is respectfully submitted that this Court should grant leave for the filing of a brief by the National Association of Regulatory Utility Commissioners, as *amicus curiae,* in this case.

Dated this 31st day of December, 1975.

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BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits, as provided by Rule 42 of the Rules of this Court, the following brief *amicus curiae* in support of the respondent, The Detroit Edison Company.

OPINIONS BELOW

The opinion of the District Court is reported at 392 F. Supp. 1110 (E.D. Mich., 1974). The affirmance of the District Court's decision by the Court of Appeals is reported at 513 F. 2d 630 (6th Cir., 1975). The decisions are included in the Appendix, beginning at 56a and 62a respectively.

QUESTIONS PRESENTED

1. Whether antitrust immunity under the State action exemption applies to a public utility's rates and services which have been approved by a State-designated regulatory authority?

2. Whether the jurisdiction of a State-designated regulatory authority may be defeated and the public interest standard embodied in State law evaded through an action brought against a public utility comprehensively regulated by that authority challenging approved rates and services of that utility under the Federal antitrust laws, even though no such challenge to the rates and services involved have ever been presented to the State regulatory commission itself?

THE INTERESTS OF THE NARUC AS *AMICUS CURIAE*

The interests of the NARUC, as *amicus curiae*, are set forth in the attached Motion for leave to file this brief.

STATEMENT

Since 1886, the respondent, Detroit Edison Company, an electric utility serving Detroit and other areas of Michigan, has provided electric power service under rate schedules that include the cost of providing certain kinds of incandescent

lamps used by its customers (App. 26a).[1] The lamp program was in effect when the State of Michigan enacted a comprehensive statute for the regulation of public utilities, including Detroit Edison, in 1916. Pursuant to that law, Detroit Edison was required to file all of its rates in the form of tariffs with the Michigan Commission, which was given the power to reject, approve or modify the rates thus filed with it. Detroit Edison included the lamp program in its rate schedules filed pursuant to these statutory requirements and, of course, included the cost of this program in the rates themselves. With respect to residential rates, Detroit Edison has followed this practice ever since, and the Michigan Commission has consistently approved these rates.[2] Surveys made in 1955 and again in 1970 on customer usage of the exchange program demonstrated that 94% and 95%, respectively, of Edison's customers used the program (App., 30a).

The statutory framework under which the Michigan Public Service Commission (MPSC) regulates Detroit Edison and other public utilities in that State is substantially similar to that provided by nearly every State in the Union. As set out in the Michigan Compiled Laws (hereinafter "MCL"), §§ 460.4 *et. seq.*, the Michigan Public Service Commission is granted "*complete power and jurisdiction to regulate all public utilities in the state . . .* " (Section 460.6). (Emphasis supplied). This power includes the regulation of "all *rates, fares, fees, charges, services, rules, conditions of service and all other matters*

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1 Detroit Edison's rates are set forth in rate schedules or tariffs filed with the Michigan Public Service Commission. These schedules describe in detail the service to be performed by Detroit Edison and the rates to be charged therefor, including the fact that "incandescent lamps," or light bulbs, will be furnished to users of electric service without "extra charge"—that is, without charge other than the rate set forth in the tariff. (App. 214a).

2 In 1964 Detroit Edison filed a tariff applicable to its commercial rates which substantially modified the light bulb plan for these customers. After investigation, the Michigan Commission approved these modifications (App. 135a, 332a-339a).

pertaining to the formation, operation or direction of such public utilities" and *"all matters pertaining to or necessary or incident to such regulation* of all public utilities, including electric light and power companies . . ." (*Id.*). (Emphasis supplied.) Other statutory provisions specifically authorize the Michigan Public Service Commission to regulate electric utilities, including "the rate of charge" and "the rules and conditions of service" for the transmission and distribution of electricity (Section 460.551).

The pervasive jurisdiction of the Michigan Commission is reinforced by broad remedial and investigatory powers. Section 460.588 requires all electric utilities to "obey and comply with every lawful order made by the commission" under sanction of fine. The statute also provides for the filing of complaints "with reference to the service rendered or any other matter", for investigation and hearings with respect to such complaints, and for the establishment of "such rules and conditions of service as shall be just and reasonable" (Section 460.557).

Orders of the MPSC are appealable to the Ingham County Circuit Court and then to the Michigan Supreme Court (Sections 460.557 and 462.26).

Petitioner herein has never filed a complaint with the MPSC concerning Edison's lamp exchange program, nor has he ever intervened in a rate proceeding to challenge the program.

Petitioner, the owner of a drug store doing business within the geographical area served by Detroit Edison, instituted a class action suit instead in a Federal court under Section 2 of the Sherman Act and Section 3 of the Clayton Act seeking treble damages and injunctive relief on behalf of all similarly situated "business entities . . . engaged in the business of selling light bulbs at retail" in Detroit Edison's marketing area (App. 4a). Specifically, the complaint alleged that Detroit Edison's light bulb program constitutes "an illegal 'tie-in' requirement in restraint of trade and commerce in the sale of standard size and quality incandescent light bulbs" and an "attempt to

monopolize and monoplization" of that market (App. 5a-6a). The complaint does not mention the Michigan Public Service Commission or the fact that the respondent is regulated by that Commission.

On respondent's motion, the District Court granted summary judgment dismissing the complaint. In doing so, the court relied upon the decision of this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), and appellate court decisions applying *Parker* v. *Brown* in the public utility context. After setting forth the relevant principles from these cases, the court held (App. 59a):

> [I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.
>
> It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the 'rates,' 'services' and 'operation' of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the 'service rendered' in proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine.

The District Court also clearly recognized the threat posed to State regulatory schemes by petitioner's approach in this matter when it concluded: "And certainly the court should not step in

when the Commission has not even been approached by plaintiff." App., 60a.

The Court of Appeals for the Sixth Circuit affirmed this decision in a memorandum, stating: "[T]he district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943)" (App. 62a).

On October 6, 1975, this Court granted certiorari. 44 U.S. Law Week (October 7, 1975).

SUMMARY OF ARGUMENT

I. The decisions of this Court in *Olsen* v. *Smith*, 195 U.S. 332 (1904) and *Parker* v. *Brown*, 317 U.S. 341 (1943), as well as numerous decisions of the Federal courts of appeals, establish the inapplicability of the Federal antitrust laws to the situation presented in this case. *Olsen* and *Parker* held that the antitrust laws do not apply to anticompetitive activities which are a part of a regulatory program established and controlled by State officials. The *Olsen-Parker* principle plainly applies to conduct such as that involved here growing out of and subject to comprehensive public utility regulation under State law.

Petitioner's contention that Detroit's light bulb program is beyond the jurisdiction of the Michigan Public Service Commission is demonstrably unsound. Under Michigan law, the Michigan Public Service Commission has regulated the light bulb plan for decades and has approved the program as a part of the rates lawfully charged by Detroit Edison. Decisions in other jurisdiction confirm the legality of the Commission's exercise of authority in this area. *Re Customers of Edison Electric Illuminating Company of Boston*, 5 P.U.R. (N.S.) 369, 386 (Mass. Dept. of Publ. Utilities 1934); *Re Wisconsin Gas and Electric Company*, 9 P.U.R. (N.S.) 517, 526 (Wis. Pub.

Serv. Comm'n 1935); *Re Hartford Electric Light Co.*, Docket No. 10047, P.U.R. 3d, Annual 1962, at 306 (Dec. 29, 1961). These commissions have exercised their powers to order light bulb plans abandoned in their States only upon specific findings that due to local conditions, the public interest would not be served by continuation of such plans.

In view of the broad language of the Michigan statute establishing the jurisdiction of the Michigan Commission, and in view of the actions of the Commission in exercising that jurisdiction, the District Court and the Court of Appeals correctly determined that the Michigan Commission properly exercised its authority under Michigan law over the lamp program. In any event, it is well settled that this Court will not itself resolve questions of local law of this nature but will accept the resolution made by district judges and Federal appellate judges more familiar with State law and practice within their jurisdiction. *Richards* v. *United States*, 369 U.S. 1, 16 n.35 (1962); *General Box Co.* v. *United States*, 351 U.S. 701, 707-708 (1956). This case is a particularly appropriate one for application of this principle, since the absence of a definitive ruling on State law results from petitioner's deliberate choice not to challenge the Michigan light bulb plan before the Commission itself.

It is very important to emphasize, we believe, that this case involves rates, and services provided thereunder, approved by a State regulatory authority. The courts of appeals have consistently held that rates charged by public utilities are a classic example of the *Parker* v. *Brown* doctrine. *E.g. Jeffrey* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129 (1975); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971).

The applicability of *Parker* to the present case is further confirmed by the course of decisions of the courts of appeals. These courts have consistently recognized that under *Parker* the Federal antitrust laws do not apply to regulated conduct of private parties when a State "determines that competition is not

the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation." *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 30 (1st Cir.), *cert. den.*, 400 U.S. 850 (1970). Either on the authority of the *Whitten* case or independently, five other courts of appeals have announced the same, or a substantially identical, understanding of *Parker*. The courts of appeals have also consistently recognized that the pervasive regulation by a State of public utilities is the ultimate, classic example of a State determination that "competition is not the *summum bonum*" in that particular field.

Both petitioner and the United States seek to limit the State action principle of *Parker*, citing, e.g., this Court's recent decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). These cases are clearly distinguishable from the one at bar. In *Jackson*, the Court found insufficient State involvement, for purposes of the Fourteenth Amendment, with a utility's termination procedures. In *Goldfarb*, the Court found that the Virginia Supreme Court had not approved minimum fee schedules for attorneys' services.

Finally, this Court should be aware that the essential nature of petitioner's case here is that the *Olsen-Parker* principle must be limited in order to prevent "unncessary intrusion into private, free enterprise" resulting from improvident actions of State authorities (Pet. Br., p. 29). This contention, supported apparently by the Justice Department, amounts to little more than an attempt to reintroduce under the guise of the Sherman Act notions of substantive due process long ago discredited by this Court. In a line of cases beginning with *Nebbia* v. *New York*, 291 U.S. 502 (1934), the Court expressly abandoned the substantive due process philosophy. If *Olsen-Parker* is limited in the manner sought here, the State regulation of businesses within their borders will be thrown back into the state of uncertainty and chaos that existed prior to *Nebbia*.

II. In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 336 (1951), this Court referred to the "dual regulation" that exists when Congress enacts laws establishing some Federal regulation of an industry but leaves to the States a substantial responsibility for regulating the same industry. This kind of Federal statute, of which the Federal Power Act is one, reflects a Federal policy supporting the continued existence of comprehensive State regulation of the utility industry. In such a situation, State regulation is protected from frustration through the antitrust laws not only by *Parker* but also by other cases establishing the relationship between Federal regulatory statutes and the antitrust laws.

With respect to Federal regulatory statutes based upon standards inconsistent with the antitrust laws, this Court has expressly recognized the need for antitrust immunity. *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975); *U.S.* v. *National Association of Security Dealers*, 422 U.S. 694 (1975).

The considerations relied upon by this Court in concluding that application of the antitrust laws would be inappropriate in *Gordon* and *NASD* are present to at least the same degree when such liability is sought to be asserted in the face of comprehensive State public utility regulation. Since *Parker* reflects the same common sense need to accommodate State regulation that *Gordon-NASD* rested upon with respect to Federal regulatory agencies, the *Parker* principle should be applied in the same way. In any event, since the continued role of State regulation of electric utilities results from deliberate decisions by Congress to establish a system of "effective dual regulation" rather than to preempt the field, State regulation is protected where, as here, it represents a part of a dual regulation scheme established and maintained by virtue of Congressional policy.

III. Alternative grounds for affirming the lower Court's decision are equitable considerations of comity and abstention. Petitioner here instituted this action in Federal court, thereby

bypassing completely procedures available to him to bring a complaint to the State Commission and to have the Commission's decision reviewed, if desired, by State courts. Interpretations of State law may, arguably, be involved in this case. In addition, although not all the requirements of the Johnson Act may be present here, this case involves rates prescribed by a State commission. Thus, the rationale of the Johnson Act—avoidance of needless friction between Federal district courts and State ratemaking bodies—is applicable here and argues for abstention. An additional reason for abstention here is the fact that the lamp exchange program is predominantly of local interest with little, if any, overriding Federal interest to outweigh the State interests involved. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341 (1951); *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission*, 465 F. 2d 237 (3rd Cir. 1972), *cert. den.*, 410 U.S. 943.

ARGUMENT

I.

THE COURT BELOW PROPERLY HELD THAT FEDERAL ANTITRUST LAWS DO NOT APPLY TO RATES AND SERVICES OF A PUBLIC UTILITY PERVASIVELY REGULATED UNDER A STATE STATUTORY SCHEME

This case presents a serious challenge to one of the most firmly established principles in American law. The State of Michigan has enacted a statutory scheme under which public utilities, including electric utilities such as the respondent Detroit Edison, are subjected to comprehensive regulation by the MPSC.

The MPSC's powers are typically broad,[3] the Michigan legislature having delegated to that State agency the power to regulate "all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities." MCL §460.4.

Pursuant to this broad authority, the MPSC has, for decades, continued its approval of Edison's lamp exchange program as an integral feature of the rates to be charged and services to be provided by that utility. Now, however, some 90 years after the exchange program was initiated and some 60 years after the MPSC was created to regulate utilities like Edison, petitioner alleges that the MPSC lacks authority to approve such a service or, in the alternative, that MPSC has never really placed its stamp of approval on the program. Under either theory, the program, it is contended, is not immune as a State action exemption to the Federal antitrust laws under *Parker* v. *Brown*, 317 U.S. 341 (1943).

There is nothing in the laws establishing and defining the powers of the MPSC which suggest that the lamp exchange program was intended to be beyond the regulatory authority of the MPSC. This is important because such programs were widespread in the industry at the time such laws were passed, and remained important features of retail electric service and rates in many areas into the 1930's. Indeed, three of the decisions relied upon by petitioner demonstrate that State regulatory commissions perceived these lamp programs as

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[3] Of course, the very purpose of creating an administrative agency to regulate public utilities is to provide the flexibility and expertise to deal with problems that are too dynamic, complex and specialized to be dealt with by the legislature itself. *Secretary* v. *Central Roig Refining Co.*, 338 U.S. 604, 610 (1950); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219-20 (1943). See also I. Barnes, *The Economics of Public Utility Regulation* at 172-173 (1932). Legislative bodies simply are unable to "define the multitudinous details appropriate" and necessary for modern economic regulatory enactments. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 363 (1951); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

subject to their broad regulatory authority. These commissions determined, for reasons varying from one locality to another, that the involved utility's lamp program should be terminated. See *Re Customers of Edison Electric Illuminating Company of Amierca,* 5 P.U.R. (N.S.) 369, 386 (Mass. Dep't. of Pub. Utilities 1934); *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (N.S.) 517, 525 (Wis. Pub. Serv. Comm'n 1935); *Re Hartford Electric Light Co.,* Dkt. No. 10047, P.U.R. 3d, Annual 1962, at 306 (Dec. 29, 1961). Petitioner's reliance on those cases plainly confuses questions concerning the jurisdiction of State regulatory commissions with questions concerning the exercise of discretion pursuant to a basic grant of authority.[4]

The Michigan Commission's exercise of authority over the lamp exchange program is, then, justifiable as being totally consistent with the expectations of the Michigan legislature when the MPSC was created in 1916. There is no Michigan statutory provision or related legislative history which would indicate that the Michigan legislature intended to *withhold* authority from the MPSC to regulate existing or future lamp exchange programs (*Cf. FPC* v. *Louisiana Power & Light Co.*. 406 U.S. 621, 636 (1972)); nor has the Michigan legislature, since 1916, ever seen fit to amend the State laws to restrict MPSC's authority over the program.

Thus, both the contention of the petitioner that this case involves matters outside the jurisdiction of the Michigan Commission and the contention of the United States as *amicus curiae* that the exercise by the Commission of this jurisdiction does not bear the positive approval of the State are sharply contradicted by the longevity of the program and MPSC's involvement therein pursuant to its broad statutory powers.

Beyond that critical fact, however, these contentions can and should be rejected by this Court on the independent ground

[4] Only the Illinois case cited by petitioner, *Consumers Sanitary Coffee & Butter Stores* v. *Illinois Commerce Commission,* 348 Ill. 615, 181 N.E. 411 (1932), in any way suggests a lack of jurisdiction over a lamp program in the State regulatory commission, but the opinion is so cryptical that the actual basis of decision is not clear.

that each of them violates the well-settled principle that the Court will not normally substitute its own views for the decisions of the District Court and the Court of Appeals as to questions of local law and practice with which those courts are more familiar. *Richards* v. *United States,* 369 U.S. 1, 16 n. 35 (1962); *General Box Co.* v. *United States,* 351 U.S. 701, 707-708 (1956); *Griffin* v. *United States,* 336 U.S. 704, 718 (1949); *Busby* v. *Electric Utilities Employees Union,* 323 U.S. 72, 74-75 (1944). Neither the District Court nor the Court of Appeals below had any difficulty in determining that the MPSC's exercise of regulatory authority over the lamp program was consistent with its enabling legislation.

It is also, we believe, extremely important to emphasize that this case involves essentially an attack on rates which have been approved as an "affirmative action of the commisison," as required by Michigan law. MCL §460.552.

The District Court satisfied itself that the Michigan Commission was far from oblivious of the fact that a bulb exchange program was an integral part of the rates approved by it. As the Court noted (App. 59a):

> [I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services.

This conclusion by the Court was amply demonstrated in the record below. See, e.g., 1972 "spead sheet" (App. 309a) and decision of the Commission in Case No. U-1791 (App. 332a, 335a-336a).

The fact that the Michigan Commission is sensitive and responsive to the responsibilities placed upon it to regulate the rates and services of electric utilities can hardly be contested. It is worthwhile, we believe, to read several recent opinions by that Commission concerning electric rates in order to gain an

understanding and feeling for both the effort exerted by it, and for the myriad of complex issues that are presented to it, in rate cases. See, e.g., *Re The Detroit Edison Company*, MPSC Case No. U-4257, 3 P.U.R. 4th 209 (1974); *Re Consumers Power Company*, MPSC Case No. U-4332, 3 P.U.R. 4th 321 (1974).

It is within the context of rate cases like *Re The Detroit Edison Company, supra*, and *Re Consumers Power Company, supra*, that the District Court's finding of sufficient State action to warrant a *Parker* v. *Brown* exemption for the lamp service makes eminent sense.

The Fifth Circuit, having the benefit of this Court's reasoning in *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975) (discussed more fully below), recently affirmed a lower court's dismissal of a suit in which plaintiffs had alleged anticompetitive practices on the part of a local telephone utility in the telephone equipment market. The rates that had been approved by the local municipal government pursuant to Texas law were based, among other factors, on the costs related to the provision of the equipment. The Fifth Circuit held that the antitrust attack was barred by the doctrine of *Parker* v. *Brown*, concluding after its analysis:

> Regulation by a governmental body of the rates to be charged by a public utility are a classic example of the *Parker* v. *Brown* exemption.
>
> *Jeffrey* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129, 1134 (1975).

In *Gas Light Co. of Columbus* v. *Georgia Power Co.*, in which the *Parker* exclusion was held to apply to various rate schedules that had been approved over the years by a State regulatory commission, the Court stated (440 F.2d 1135, 1140 (1971)):

> Our view is that the *Parker* exclusion applies to rates and practices of public utilities enjoying

> monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority; . . . .

In supporting the petitioner's position here, the United States, in its *amicus* brief, placed considerable emphasis on this Court's decision in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1975). The United States concluded that the situation in the instant case "thus apparently parallels that in *Jackson*, where the State regulatory commission carefully scrutinized the rate portions of the tariff but did not specifically consider the provision that was challenged under the Civil Rights Act (419 U.S. at 354-355)." U.S. Br., 11.

It is, of course, one thing to suggest that the *Jackson* case runs "parallel" to the instant case and another to suggest, as the United States does, that the issues and facts underlying the *Jackson* decision compel a similar decision here of a lack of State action. The two cases are significantly disparate and warrant different determinations on the State action issue.

Jackson involved the question of whether the Pennsylvania Public Utility Commission was "sufficiently connected" with an electric utility's procedures for termination of service so as to make the utility's "conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. *Id.*, 419 U.S. 359. The Court held that the nexus was insufficient *for purposes of the Fourteenth Amendment under the facts of that case.*

To determine whether a sufficient nexus has been formed for the State action doctrine to be applied under *Parker* v. *Brown* requires, in the first place, quite different considerations than those analyzed by the Court in *Jackson*. As the Court of Appeals for the Seventh Circuit, sitting *en banc*, pointed out in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F. 2d 638, 654 n. 35 (7th Cir. 1972), *cert. den.*, 409 U.S. 1114 (1973):

> Compliance with state economic regulations may *provide a private company with a defense to a* Sherman Act prosecution, see, *e.g.*, Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315, but the inapplicability of that federal statute to certain conduct does not imply that an entirely different federal statute does apply. We do not view the Civil Rights Act of 1871 as either a species of or a substitute for, anti-monopoly legislation.

In *Jackson*, this Court also found that there had been a total lack of scrutiny, of many years' duration, by the State Commission of the utility's termination procedures. 419 U.S. 354-5. Given the record in this proceeding and the fact that the lamp exchange program had been for decades an integral and conspicuous part of the service provided by Detroit Edison under approved rate schedules, it can hardly be suggested that the MPSC was oblivious to the existence of the program and its impact on rates charged and services provided thereunder. [5]

This Court in *Jackson* also seriously questioned whether the Pennsylvania PUC regulation *required* any filing on the part of the electric company respondent of termination procedures as a part of its tariff and whether the Commission had power to disapprove the procedures (419 U.S. 355). The Court further concluded that, "[a]t most, . . .[the] Pennsylvania utility was authorized to employ such a practice if it so desired." 419 U.S. 357.

The circumstances in this case are entirely different. Here, the costs of the lamp exchange program are specifically included in the rates approved by the MPSC. Such rates cannot go into effect without the "affirmative action" of the Michigan Commission. Once the rates are approved, predicated partly on the basis of the costs of the lamp exchange program and the

[5] In this regard, it is important to point out that petitioner here is not really complaining about the way the lamp exchange program has been implemented. He is clearly challenging the right of the MPSC to approve *any* lamp exchange program, irrespective of the extent of scrutiny by the MPSC of the detailed implementation of the program.

services to be provided, Detroit Edison has no choice but to provide the service. The sovereign command to act is clear here as the District Court concluded by observing: "Defendant cannot discontinue this light bulb program while continuing to charge the approved rate." App., 59a. The existence here of a clear command by the State to act distinguishes this case from *Jackson*, *Goldfarb* v. *Virginia State Bar Association*, *supra*, and from cases like *United States* v. *Pacific Southwest Airlines*, 358 F. Supp. 1224 (C.D. Cal., 1973), *cert. dis.*, 414 U.S. 801 (State regulatory commission authorized a proposed merger, but did not require the consummation of the proposal).

The decision by this Court in *Goldfarb* v. *Virginia State Bar Association*, *supra*, is heavily relied upon by the petitioner (Pet. Br., 15-16), but we believe such reliance is misplaced.

Goldfarb involved the issue of whether minimum fee schedules published by the Fairfax County Bar Association and enforced by the Virginia State Bar violated Federal antitrust laws by fostering prohibited anticompetitive practices for the benefit of their members. This Court found that such practices by the Bars were not immune from the Federal antitrust laws under *Parker* "because it cannot fairly be said that the State of Virginia through *its Supreme Court rules* required the anticompetitive activities of either respondent." 421 U.S. 790. (Emphasis supplied). The Court found that the Virginia Supreme Court was authorized by State law to regulate the practice of law, that the Virginia Court "far from exercising state power to authorize binding price-fixing, explicity directed lawyers not 'to be controlled' by fee schedules," (421 U.S. 789), and that there was "no indication in this record that the Virginia Supreme Court approves the [ethical] opinions [of the State Bar]". 421 U.S. 791.

As discussed above, the record here clearly demonstrates that the MPSC was aware of, and approved, the lamp exchange program as an integral feature of rates to be charged and the services to be provided by Edison. The District Court found

such active approval on the part of the MPSC to have been sufficiently demonstrated. App., 59a.

Clearly, what is involved here are the rates charged and services provided by a company that undoubtedly falls under the classification of a "heavily regulated utility with at least something of a governmentally protected monopoly [whose acts] will more readily be found to be State 'acts' than will be the acts of an entity lacking these characteristics." *Jackson, supra,* at 419 U.S. 351.

A State determination to replace competition with a pervasive scheme of economic regulation over an industry must be given considerable, separate weight in any evaluation of whether a particular activity of a company heavily regulated under that scheme should be held immune from antitrust attack.

More than seventy years ago, shortly after the passage of the Sherman Act, this Court rejected the contention that a law of the State of Texas regulating pilots in the port of Galveston should be held invalid because it excluded otherwise competent pilots from rendering such services in competition with those licensed by the State. *Olsen* v. *Smith,* 195 U.S. 332 (1904). The State law involved in *Olsen* had been attacked both under the Due Process Clause of the Fourteenth Amendment and under the Sherman Act. The Court peremptorily rejected the due process claim, saying (195 U.S. at 344):

> . . . this proposition in its essence simply denies that pilotage is subject to governmental control. . . .

The Court then rejected the Sherman Act claim, pointing out that a claim under that Act did not differ in any substantial respect from a claim under the Due Process Clause when applied to activities made subject to state regulation (195 U.S. at 345):

> The contention that . . . the commissioned pilots have a monopoly of the business, and by a combination among themselves exclude all others

> from rendering pilotage services, is also but a denial of the authority of the state to regulate. . . .

This Court has never departed from the almost contemporaneous construction of the Sherman Act set forth in *Olsen*—a construction that reflected the Court's explicit recognition that any other view would transform the Sherman Act into "a denial of the authority of the state to regulate." Thus, in *Parker* v. *Brown,* where a suit was brought to enjoin State officials from enforcing an agricultural proration and marketing program regulating the handling, disposition and prices of raisins in California, the Court held that the antitrust laws were not intended to prevent the States from establishing such programs and, on that basis, rejected the contention that the implementation of the program violated the antitrust laws.

The decisions in *Olsen* v. *Smith* and *Parker* v. *Brown* have long been recognized as establishing the broad principle that where a State chooses to displace competition with a comprehensive regulatory statute reflecting different policies, the antitrust laws do not apply to conduct growing out of and subject to such regulation. Thus, in relying upon *Parker* v. *Brown,* The Courts below in this case cited and relied upon decisions of the Federal courts of appeals which recognized precisely that broad principle. Indeed, that has been virtually the uniform understanding of *Parker* v. *Brown* among the Federal courts of appeals.

A leading case setting forth this understanding of *Parker* v. *Brown* is *Whitten* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir.), *cert. den.,* 400 U.S. 850 (1970), in which the First Circuit stated (424 F.2d at 30):

> Our reading of *Parker* convinces us that valid government action confers antitrust immunity . . . when government determines that competition is not the *summum bonum* in a particular field and

deliberately attempts to provide an alternate form of public regulation.[6]

The pervasive regulation by a State of public utilities is, of course, the ultimate, classic example of a State determination that "competition is not the *summum bonum*" in that particular field. This too has explicitly been recognized by the courts of appeals. In *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F. 2d 243 (4th Cir. 1971), for example, the Court of Appeals for the Fourth Circuit expressly rejected an effort to impose antitrust liability upon a regulated electric power company because of the inconsistency between the antritrust standard of competition and State regulation based upon a public interest standard (438 F.2d at 254):

> We suggest that the rationale and underlying purpose of both the Sherman and Clayton Acts is to prevent monopoly *where it is not in the public interest*. It has long since been established that both gas and electricity can best be produced and distributed (and the public benefited) by monopoly under state regulation. The problem here is not one of preventing monopoly . . . but of making lawful monopoly work best in the public interest. Doubtless, we think, SCC can do a better job than private piecemeal application of laws aimed against monopoly. (Emphasis supplied.)

[6] In *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931, 941 (D.C. Cir. 1971), the Court of Appeals for the District of Columbia quoted this portion of the *Whitten* opinion as its understanding of the *Parker* v. *Brown* principle, as did the Court of Appeals for the Ninth Circuit in *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363, 368-369 (9th Cir. 1974). And in *Ladue Local Lines, Inc.*, v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F. 2d 131 (8th Cir. 1970), the Eighth Circuit stated the same understanding of *Parker* v. *Brown* in only slight different language (433 F. 2d at 137). The formulation of the *Parker* v. *Brown* principle by the Eighth Circuit in *Ladue Local Lines* paraphrased the earlier interpretaiton of the Fourth Circuit in *Asheville Tobacco Board of Trade Inc.* v. *FTC*, 263 F. 2d 502, 509 (4th Cir. 1959). This is also the formulation that was accepted by the Court of Appeals for the Third Circuit in *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F. 2d 1011, 1017 (3d Cir. 1971).

The Court of Appeals for the Fifth Circuit reached the same result with respect to the regulated electric power company involved in *Gas Light Co. of Columbus* v. *Georgia Power Co., supra.*

The same result has been reached in the Fourth, Fifth and Sixth Circuits with respect to telephone companies pervasively regulated under State law. Thus, in *Business Aides, Inc.*, v. *Chesapeake and Potomac Tel. Co. of Va.*, 480 F. 2d 754 (4th Cir. 1973), the Fourth Circuit quoted that portion of the Fifth Circuit's holding in the *Gas Light Co. of Columbus* case set out above in rejecting an effort to impose antitrust liability upon a pervasively regulated telephone utility and added (480 F. 2d at 756):

> If its [defendant's] actions were occasioned by adherence to the rules and regulations of its operative tariff, then it is shielded from liability for any possible antitrust violations.

In *Lamb Enterprises, Inc.* v. *Toledo Blade Company*, 461 F. 2d 506 (6th Cir. 1972), the Sixth Circuit reached the same result on virtually identical reasoning (461 F. 2d at 513):

> A public utility may not be held for an anti-trust violation when it has complied with its tariff.

And in the most recent case dealing with this question, the Fifth Circuit reached an identical result. *Jeffrey* v. *Southwestern Bell Tel. Co., supra.*[7]

[7] The same conclusion was reached in a thoroughly researched and well reasoned article exploring the rationale and scope of *Parker* v. *Brown*. See Paul R. Verkuil, "State Action, Due Process and Antitrust: Reflections on *Parker* v. *Brown*," 75 Columbia L. Rev. 328, 353 (1975), where the author concludes that the rationale for applying *Parker* v. *Brown* to public utilities, as set forth in *Washington Gas Light, supra*, "is firmly rooted in the public utility/public calling context."

There is, thus, considerable agreement that antitrust suits against public utilities based on activities growing out of and subject to State regulation are precluded by the principle in *Olsen* and *Parker*.[8] When suits such as the instant one are essentially attacks against rates and related services approved by State regulatory commissions, they are "classic examples" for the application of the *Parker* exemption.

Finally, a word about the more frightening aspects of this case for State regulation of business in general.

Petitioner's basic position here, which is apparently supported by the United States as *amicus curiae*, is that the *Olsen-Parker* principle must be limited in order to prevent "unnecessary intrustion into private, free enterprise" resulting from improvident actions by State regulatory authorities (Pet. Brief, p. 29). This contention lays bare the essential nature of this case, which, from a legal standpoint, amounts to little more than an attempt to reintroduce under the guise of the Sherman Act notions of substantive due process long ago abandoned by this Court as a justification for denying to the States the power to regulate certain businesses in the public interest.

The power of the States to displace a scheme of free and open competition with a scheme of regulation in which competition is only one of many factors to be taken into account in the public interest was first established in *Munn* v. *Illinois*, 94 U.S. 113 (1877). With the vindication of the State's power to regulate certain businesses in the public interest, a substantial number of States enacted regulatory statutes even before the passage of the Sherman Act in 1890—a trend which continued unabated

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[8] The Ninth Circuit, in *Industrial Communications Systems, Inc.* v. *Pacific Tel & Tel. Co.*, 505 F. 2d 152 (1974), chose, however, to refer the antitrust case to the California Public Utilities Commission under the doctrine of primary jurisdiction. The Court pointed out that ultimate adjudication of the case would depend on "whether the scope and nature of the regulatory control exercised in the particular case precludes application of the antitrust laws." 505 F. 2d 157. See, also, *Carter* v. *American Tel. & Tel. Co.*, 365 F. 2d 486, 493-7 (5th Cir., 1966), *cert. den.*, 385 U.S. 1008.

following its passage. However, efforts to frustrate and destroy such State regulation continued. During the 1920's and the early 1930's, this Court repeatedly struck down State regulation on the ground that such regulation violated the Due Process Clause of the United States Constitution. *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (1932). However, in a line of cases beginning with *Nebbia* v. *New York*, 291 U.S. 502 (1934), the Court expressly abandoned the substantive due process philosophy, expressly overruled a number of its prior decisions and once again reaffirmed the regulatory power of the States. *Parker* v. *Brown* represented the culmination of this process in that the Court there refused to permit the reintroduction of substantive due process notions under the guise of the Sherman Act.

The complaint in this case raises anew the very questions that were resolved in *Nebbia*. If *Olson-Parker* is limited in the manner sought here, the power of the States to regulate businesses within their borders will be thrown back into the very state of uncertainty and chaos that existed prior to *Nebbia*. Hence, although the specific controversy that gives rise to this case seems relatively unimportant, the Court should be mindful of Justice Brandeis' dissent in *New State Ice*, where he pointed out that "the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern," and "[i]f it is a matter of public concern, it may be regulated, whatever the business" (285 U.S. at 301). The rate structure of electric utilities and the conditions of electric power service are unquestionably matters of public concern in Michigan and this Court should not therefore permit interference with its regulation.

The principle of *Parker* v. *Brown* is vital to effective State regulation and should not be eroded, particularly on the basis of the sort of gross speculation and wholly imaginary dangers sought to be relied upon here. Certainly, petitioner's contention that a full application of the principle of *Olsen-Parker* to public

utilities would subject the national economy to serious dangers from State commissions is unsound. The short answer to that contention is that, as this Court pointed out in *Parker* v. *Brown*, the Federal antitrust laws were aimed at private conduct and were never intended to protect the economy against the regulatory policies of State commissions or the State legislatures which establish them.

This Court should not treat the Sherman Act as though it has quasi-constitutional status which justifies invalidating State regulatory statutes simply because they do not comport with the Antitrust Division's economic theories. Such a view would turn this Court into a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). As the Court said in *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963):

> The . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws . . . .

II

THE DUALITY OF STATE AND FEDERAL REGULATION OF ELECTRIC UTILITIES CONSTITUTES AN INDEPENDENT GROUND PRECLUDING APPLICATION OF THE FEDERAL ANTITRUST LAWS TO MATTERS SUBJECT TO STATE REGULATORY JURISDICTION

In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 337 (1951), this Court referred to the "effective dual regulation" that results from Federal statutes regulating certain aspects of public utility industries but leaving substantial aspects of those industries to regulation by the States. The *Panhandle Eastern* case had specific reference to the dual regulation established by the Natural Gas Act (15 U.S.C. § 717), which expressly exempts

"the local distribution of natural gas [and] the facilities used for such distribution" and other "matters primarily of local concern and subject to regulation by the several states" from the Federal act and leaves those matters within the regulatory jurisdiction of the States. The Federal Power Act establishes this same kind of dual State and Federal regulation. Indeed, the Federal Power Act goes even further than the Natural Gas Act and recognizes the continuing role of State regulation of electric utilities through a provision that "Federal regulation . . . [is] to extend only to those matters which are not subject to regulation by the States" (16 U.S.C. §824(a)). [9]

The Court in *Parker* held that State-regulated anticompetitive practices were exempt from attack under the Federal antitrust laws because the "Sherman Act did not undertake to prohibit" State action (317 U.S. 352) and noted: "In a dual system of government in which, under the Constitution, the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. 351.

The Court in *Parker* further found that the State regulation of the marketing and pricing of California raisins was harmonious with the Federal regulatory scheme contained in the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246). 317 U.S. 352-359. As the Court of Appeals for the District of Columbia has noted (*Hecht* v. *Pro-Football, Inc.*, 444 F.2d at 937):

> Thus, Parker v. Brown involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves

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[9] The Communications Act of 1934 also contains several similar provisions barring the exercise of jurisdiction by the Federal Communications Commission over intrastate communications (47 U.S.C., §152(b)(1)), and even over some interstate communications "where such matters are subject to regulation by a State commisison or by local governmental authority" (47 U.S.C., §221(b)).

> sovereign state regulatory action which is consistent with federal national policy, *i.e.*, the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of federal antitrust policy.

In view of the explicit Congressional recognition of State regulatory power over electric utilities, the State action that is involved in this case is protected not only by the State action principle in *Olsen* v. *Smith* and *Parker* v. *Brown*, but also by the plain Congressional purpose evident in the Federal Power Act that the traditional scope of the efficacy of State regulation of electric power utilities remain undiminished.

The issue of reconciling the antitrust laws with other Federal regulatory schemes was presented to this Court in two cases decided last June (*Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975) and *United States* v. *National Association of Security Dealers*, 422 U.S. 694 (1975)).

In *Gordon*, the Court had before it the task of reconciling the antitrust laws with the regulatory scheme governing the practices of the securities exchange and their members, an industry (unlike electric utilities) not traditionally regarded as a public utility. This Court held that application of the antitrust laws to the regulated exchanges, and in particular to their practice of approving fixed commission rates, "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates" (422 U.S. 691). In the course of so holding, the Court stated that the reason for this conclusion was the fundamental inconsistency between the requirements and standards the SEC must follow in approving rates and the competition standard of the Sherman Act (422 U.S. 689-90).

> If antitrust courts were to impose *different standards or requirements*, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the

> SEC. Such *different standards are likely to result* because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry . . . . *[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme* authorized by Congress rather than supplement that scheme. (Emphasis supplied.)

Similarly, in *United States* v. *National Association of Securities Dealers*, *supra*, this Court upheld the dismissal of an antitrust attack upon certain sales and distribution practices employed in the marketing of mutual fund shares which were subject to regulation by the SEC. The Court held that "the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts" and stated (422 U.S. at 734-5):

> . . . we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. See *Hughes Tool Co.* v. *Trans World Airlines*, 400 U.S. 303 (1973); *Pan American World Airways, Inc.* v. *United States*, 372 U.S. 206 (1963). In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent stand-

ards. This is hardly a result that Congress would have mandated.[10]

The standards developed in *Gordon* and *NASD* for implying the inapplicability of Federal antitrust laws to regulatory schemes entrusted to Federal agencies are equally pertinent to the questions presented here. The dilemma of a regulated company faced with "duplicative and inconsistent standards" under State public utility regulation and the antitrust laws is equally real. Similarly, the situation of a regulatory agency seeking to enforce a public interest standard in the face of Federal court intervention to enforce a pure competition standard is precisely the same, whether that agency be State or Federal if the reasoning of *Gordon* and *NASD* is sound—and we believe it to be eminently sound—that reasoning applies with full force to State regulation of public utilities.

Indeed, despite the entrance of the United States in this case as *amicus* to argue that the Michigan Commission's "indirect authorization" of the lamp exchange program was insufficient State action to have *Parker* apply, the United States has previously recognized that a pervasive scheme for public utility regulation represents an *a fortiori* situation for implied immunity to the antitrust laws.

In its *amicus* brief in *Gordon*, the United States stressed that public utility-like regulation was *not* involved (U.S. Brief in *Gordon* v. *New York Stock Exchange*, p. 35):

> The language, structure and history of the Act, as set forth above, show that Congress did not

[10] Prior to this Court's decision in *Gordon* and *NASD*, the leading case in this area was *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). There the Court upheld dismissal of the Sherman Act complaint challenging matters subject to comprehensive regulation by the CAB because concurrent jurisdiction would subject air carriers to inconsistent standards and potentially conflicting judgments (371 U.S. at 309-10). This Court applied precisely the same rationale in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

> intend to substitute a comprehensive, public utility-like system of government regulation for the regime of competition fundamental to private enterprise in other sectors of the economy.

It then relied upon this fact as the very basis for its argument that the antitrust laws could be applied in *Gordon* (*Id.*, at 36):

> *Because* the scheme of regulation is thus limited, and *because* members of the exchanges enjoy the same private initiative as other commercial enterprises, they are subject to the national policy of competition. (Emphasis supplied.)[11]

Hence, in *Gordon*, the United States essentially recognized, at least with respect to Federal regulation, the very principle which it opposes here with respect to State regulation.

We believe, then, that the same standards announced and applied in *Gordon* and *NASD* where Federal regulation is involved should be equally applicable under *Olsen* v. *Smith* and *Parker* v. *Brown* where State regulation is involved.[12]

[11] The Court itself recognized this essential nature of the United States' argument in *Gordon* (422 U.S. 688):

> The United States appears to suggest that only if there is a pervasive regulatory scheme, as in the public utility area, can it be concluded that the regulatory scheme ousts the antitrust laws. Brief for the United States 16, 35.

[12] Application of *Gordon* and *NASD* standards to State and Federal regulation would not necessarily mean that the interstate and intrastate aspects of the same industry would be identical. In many instances, there are major differences between the degree and kind of regulation to which the interstate aspects of an industry are subjected under Federal law and the regulation of that industry under State law. Hence, the fact that the Court in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), found, in a four to three decision, that "Congress rejected a pervasive regulatory scheme for controlling the *interstate* distribution of power in favor of voluntary commercial relationships" (410 U.S. at 374) (emphasis

III.

ALTERNATIVE GROUNDS FOR AFFIRMING THE LOWER COURT'S DECISION ARE EQUITABLE CONSIDERATIONS OF COMITY AND ABSTENTION

The Courts below were obviously concerned with the propriety of petitioner initiating this action in a Federal court to contest rate determinations of a State regulatory agency, thereby bypassing completely the remedies available to him under State law to contest such decisions both before the Commission and the State courts. Although the lower Courts did not expand on this point, the District Court's concern was clearly stated in the last sentence of its Opinion where it observed: "And certainly the court should not step in when the Commission has not even been approached by plaintiff." App. 60a.

(continued from previous page)
supplied), and, therefore, that "the limited authority of the Federal Power Commission" (*Id.*) did not immunize the challenged conduct of Otter Tail from the antitrust laws, in no way indicates either that State regulation of the local retail distribution of electric power is not comprehensive or that such regulation does not provide a basis for antitrust immunity.

Moreover, both the Federal Power Act and the Public Utility Holding Company Act recognize not only that the States have exclusive jurisdiction to regulate the local distribution of electric power, but also that the States may approve actions of public utilities which reduce or eliminate competition when such action, in the opinion of the State public utility commission, will serve the public convenience and necessity of the State. For example, the Public Utility Holding Company Act's prohibition on the common ownership of electric and gas utilities serving the same territory is expressly limited to exempt such common ownership approved by the State commission (15 U.S.C. §79h). Similarly, the Act explicitly recognizes the power of the State commissions to permit public utilities to acquire the securities or assets of other utilities (15 U.S.C. §791(b)). The Federal Power Act and the Public Utility Holding Company Act are thus premised on the recognition that the electric power industry is composed at the retail level of local distribution monopolies regulated by the States through their public utility commissions in accordance with the public policy of the State.

It is well established that a Federal court should abstain from exercising its jurisdiction in order to avoid unnecessary conflict with the administration by a State of its own affairs. *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341 (1951); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

Burford v. *Sun Oil Co., supra,* involved an attack on the validity of proration orders in Texas oil fields on the ground, among others, that the orders denied to Sun Oil due process of law. The Court found that the exercise of the district court's jurisdiction would have interfered with a unified and comprehensive State scheme for regulating a complex industry. The Court stated (319 U.S. 333-4):

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Cf. Matthews v. Rodgers, 284 US 521, 76 L ed 447, 52 S Ct 217. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

In *Alabama Public Service Commission* v. *Southern Ry. Co., supra,* the Supreme Court determined that the Johnson Act (28 U.S.C., §1342) was inapplicable since the Commission order that was challenged did not concern rates. The involved order related to a request to discontinue passenger train service. This Court decided that the District Court should have declined to exercise its jurisdiction in order to avoid "needless friction with

state policies." The railroad, the Court held, should have pursued its rights through the State courts. 341 U.S. 350.

Although all four requirements of the Johnson Act may not be met in this case, the fundamental rationale for that Act—avoiding disruption of State ratemaking procedures by Federal district courts—is applicable here. Petitioner here is, in effect, requesting a Federal injunction against the enforcement of rates approved by the MPSC without first having exhausted State remedies available to him, both before the Commission and the State courts.

In addition, part of petitioner's suit is based on the allegation that the MPSC has exceeded its State-delegated authority by including the lamp exchange program in the services provided pursuant to approved rates. This point concerning the scope of MPSC's authority has, arguably, not definitely been decided by the Michigan courts, thereby bringing the Court's rationale in *Burford* v. *Sun Oil Co., supra,* for Federal abstention into play. See, also, *Lake Carriers' Assoc.* v. *MacMullen,* 406 U.S. 498, 510-511 (1972).

In the recent case of *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission,* 465 F. 2d 237 (3rd Cir. 1972), *cert. den.,* 410 U.S. 943, the Court of Appeals for the Third Circuit held that equitable abstention was proper even though the issue in the case was whether the airline must submit to the jurisdiction of the Pennsylvania Commission prior to terminating intrastate passenger service between certain cities. The airline was challenging the jurisdiction of the Pennsylvania Commission and claimed that the Federal Aviation Act preempted the authority of the State in this area.

The Court in *Allegheny Airlines,* in affirming the applicability of the abstention doctrine to the facts in that case, mentioned several factors which prompted its conclusion: 1) The State concerns were significant; 2) No evidence was presented that the plaintiff would have been harmed if it had resorted to the State commission and State courts; 3) The

reliance by local communities on the services that had originally been authorized by the State commission; 4) The lack of any other overriding Federal concerns that would outweigh the above factors. 465 F.2d at 244-245. We submit that all those factors are equally applicable here.

For the reasons given above, the lower Court's decision should be affirmed on the alternative grounds of comity and abstention.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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No. 75-122

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
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v.
THE DETROIT EDISON COMPANY,
Respondent.

No. 75-122

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE MICHIGAN UTILITIES GROUP

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Now comes a group of Michigan utilities, consisting of Michigan Bell Telephone Company, Michigan Consolidated Gas Company, Michigan Gas Utilities Company and Michigan Power Company, and, pursuant to Rule 42 of the Rules of this Court, moves for an order permitting it to file a brief herein as *amicus curiae*. In support of its motion, the Michigan utilities group respectfully states as follows:

1. The Michigan utilities group consists of public utilities providing utility services to the people of the State of Michigan.

Michigan Bell Telephone Company provides telecommunications services; Michigan Consolidated Gas Company and Michigan Gas Utilities Company provide gas services; Michigan Power Company provides electric power and gas services. Each of these utility companies is subject to the regulatory jurisdiction of the Michigan Public Service Commission.

2. Petitioner has raised a question in this case which affects all public utilities, including particularly the Michigan utilities group and other public utilities operating in the State of Michigan. Michigan's public utility regulation, like that of other States, is based upon a recognition that competition does not protect the public interest in certain industries, and that comprehensive regulation must be substituted for competition if the public interest is to be served. Under Michigan law, as elsewhere, public utilities are required to conduct their businesses in accordance with this public interest standard. The federal antitrust laws, on the other hand, are based upon a unidimensional competition standard. Thus, application of the federal antitrust laws to the activities involved here—activities of a regulated public utility subject to the jurisdiction of and approved by a state public utility commission—would place all public utilities in a position in which they may be faced with duplicative and inconsistent standards of conduct. This would not only be inherently unfair to regulated utilities but would frustrate effective implementation of the public interest standard by the States.

3. In view of the importance of the question presented in this case, the Michigan utilities group sought the consent of petitioner and respondent to file its brief *amicus curiae.* While respondent indicated its willingness to consent, petitioner declined to do so. Hence, the group files this motion for leave to present its views on this question which it believes may not be fully or adequately presented by the parties. Respondent is naturally concerned with the defense of the particular tariff provision involved in this case. The possibility exists, therefore,

that respondent may not adequately deal with the more general question of the applicability of the federal antitrust laws to activities of public utilities resulting from and subject to regulation by a state public utility commission. This possibility is heightened by the fact that the particular tariff provision attacked by petitioner may be virtually *sui generis,* having been abandoned by most States. In these circumstances, respondent may feel compelled to devote a large part of its brief to an explanation of the merits of such a tariff provision, even though that question is not itself before the Court.

4. The Michigan utilities represented herein have an interest in this case that reflects the interest of all regulated public utilities, particularly utilities operating in Michigan, but also including utilities operating under similar regulatory jurisdiction in other States. The group is therefore in an ideal position to present a brief as *amicus curiae* dealing with the broad implications of the question presented.

For these reasons, the Michigan utilities represented herein request leave to file their brief as *amicus curiae* at or before the time set for the filing of the brief of the respondent herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
Petitioner,
v.
THE DETROIT EDISON COMPANY,
Respondent.

No. 75-122

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE MICHIGAN UTILITIES GROUP AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Michigan utilities group consists of public utilities providing utility services to the people of the State of Michigan pursuant to Michigan law which establishes a comprehensive regulatory scheme administered by the Michigan Public Service Commission. Michigan Bell Telephone Company provides

telecommunications services; Michigan Consolidated Gas Company and Michigan Gas Utilities Company provide gas services; Michigan Power Company provides electric power and gas services. For all purposes here relevant, the laws and regulatory authority under which these utilities operate are identical to those under which the respondent Detroit Edison operates.

The regulation of public utilities in Michigan is predicated upon the theory that unrestricted competition does not adequately serve the public interest with respect to utility services. Consequently, Michigan has enacted a comprehensive statutory scheme which substitutes regulation for competition in these industries and vests the Michigan Public Service Commission with the responsibility for such regulation. The Michigan Commission is expressly empowered, among numerous other things, to control entry, prices and the terms and conditions of services rendered in utility industries.

The standard to be applied by the Michigan Commission in regulating public utilities is not the standard of free and open competition but a public interest standard based upon the concept of public convenience and necessity. The Michigan Supreme Court has held that "The right to exclude . . . competition, where the general public convenience and necessities so require, has been delegated by the legislature to the Michigan public service commission." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich. 650, 44 N.W.2d 324, 330 (1950), *aff'd,* 341 U.S. 329 (1951).

As companies regulated under a public interest standard, public utilities in Michigan have an affirmative duty to seek out and serve the public convenience and necessity. Under the Michigan regulatory scheme, public utilities may initiate rate and tariff proposals subject to the overriding authority of the Michigan Commission to approve, reject or modify any such proposals. However, this initiative is exercised subject to the

same statutory standard under which these public utilities are regulated. Hence, all public utilities are obligated to follow the public interest standard—that is, to make such rate and tariff proposals as they believe will serve the public convenience and necessity—even if the rates and tariffs proposed might have an adverse effect upon competition.

No one has ever attacked the tariff provision challenged here as inconsistent with the public interest standard under which it was proposed by respondent and approved by the Commission. Instead, the theory advanced in this case is that respondent's tariffs can be attacked, the enforcement of such tariffs enjoined, and respondent held liable for treble damages—all wholly independent of the public convenience and necessity of the State of Michigan—if such tariffs fail simultaneously to satisfy the competition standard of the federal antitrust laws.

Such a theory, if accepted by this Court, would radically alter existing systems of public utility regulation, make it impossible for public utilities to serve the public interest, and impose substantial financial harm upon many utilities by exposing them to massive treble damage suits. The Michigan utilities group represented herein is deeply concerned with each of these possible consequences. Its interest here is to help persuade the Court that such consequences can and should be avoided, since the theory upon which this case is brought is demonstrably unsound and contrary to the settled line of decisions of this Court.

QUESTION PRESENTED

Whether the activities of a public utility within the framework of a comprehensive state regulatory scheme are subject to the antitrust laws even though that regulatory scheme is based upon a deliberate state policy to substitute regulation for competition in public utility industries?

STATEMENT

The Michigan Public Service Commission approved tariffs submitted to it by respondent Detroit Edison which include in the rates for basic electric service the cost of providing light bulbs to its customers (App. 215a). The approved tariffs are expressly conditioned upon Detroit Edison's providing light bulbs "without extra charge" (App. 214a). Michigan law provides that Detroit Edison must submit tariffs containing all rates, terms and conditions of service to the Commission before it can offer service to the public (Michigan Compiled Laws § 460.552) and further provides that once tariffs are approved and permitted to go into effect, they must be observed by all concerned—both the utility and its customers (M.C.L. § 460.557).

The essential complaint of petitioner here is that in complying with these provisions of Michigan law, respondent has caused him competitive injury. Petitioner did not complain of any injury to the Michigan Commission, but sought instead to obtain an injunction and treble damages under the federal antitrust laws.

Both the district court and the court of appeals below rejected this claim. Relying upon this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), the district court held that the federal antitrust laws have no application to the "service rendered" by respondent pursuant to its tariffs (App. 59a):

> "[I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.
>
> "It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the 'rates,' 'services' and 'operation' of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the 'service rendered' in proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine."

The Court of Appeals for the Sixth Circuit affirmed the district court's decision, expressly approving the holding "that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943)" (App. 62a).

SUMMARY OF ARGUMENT

The decision of this Court in *Parker* v. *Brown* reaffirmed the power of the States to substitute regulation for competition where deemed necessary in the public interest and held that the federal antitrust laws do not apply to conduct resulting from and subject to such regulation. Contrary to the contentions of petitioner and the United States as *amicus curiae*, the tariff provision involved in this case is a part of a regulatory scheme enacted by the State of Michigan pursuant to and reflecting precisely this kind of policy determination. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 328 Mich. 650, 44 N.W.2d 324 (1950), *aff'd*, 341 U.S. 329 (1951). Hence, this case falls squarely within the principles established in *Parker* v. *Brown*.

Parker v. *Brown* rests upon two principles that are vital in the regulation of public utilities: first, that the federal courts should respect the power of the States to substitute regulation for competition in businesses within their respective borders where, in the judgment of the State involved, unrestricted competition will not serve the public interest; and, second, that

businesses regulated in the public interest should not be subjected to the inconsistent standard of the federal antitrust laws with respect to the very matters that the State has determined should not be left to unrestricted competition.

The first of these principles is one of broad application which has been reflected not only in the decisions of this Court involving attacks upon state regulation based upon the federal antitrust laws, but also upon other federal laws. See, *e.g., Reid* v. *Colorado,* 187 U.S. 137, 148 (1902); *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249, 256 (1931); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413-414 (1973). The principle even extends to cases involving attacks upon state regulation based upon such constitutional provisions as the Due Process Clause and the Commerce Clause. In a long line of cases, this Court has recognized that the Due Process Clause neither restricts the power of the States to regulate nor imposes any particular economic theory upon state regulation. See, *e.g., Nebbia* v. *New York,* 291 U.S. 502 (1934); *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963), and cases cited therein. Similarly, the Court has held that the Commerce Clause does not prevent the States from substituting regulation in the public interest for competition in public utility industries which are essentially local. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951). The principles applied in these cases are directly related to the principles underlying *Parker* v. *Brown,* as the Court itself expressly recognized in a decision shortly after the Sherman Act was passed. *Olsen* v. *Smith,* 195 U.S. 332 (1904).

The respect for the States' power to regulate reflected in all of these decisions is necessarily tied to the second principle underlying *Parker*—that as to matters with respect to which the States have substituted regulation for competition, regulated companies should not be subjected to the inconsistent standards of the federal antitrust laws. Common sense, as well as the most elemental considerations of fairness, demand no less, since a company regulated under a public interest standard that subordinates competition to other public interest considerations cannot be expected simultaneously to serve two masters.

This Court has itself recognized the necessity of protecting regulated companies from duplicative and inconsistent standards where federal regulation is involved. *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975); *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975). The principle relied upon in these cases has equal application where state public utility regulation is involved. Although the States have no power to authorize or expressly to immunize antitrust violations, they do have the power under *Parker* to remove activities from the scope of the federal antitrust laws by subjecting them to comprehensive regulation under a standard inconsistent with that of unrestricted competition. When the States exercise that power, the same considerations apply that led the Court in *Gordon* and *NASD* to protect federally regulated companies from duplicative and inconsistent standards. Indeed, as the United States itself argued as *amicus curiae* in *Gordon,* public utility regulation constitutes an *a fortiori* situation for application of this principle.

Both petitioner and the United States contend that *Parker* applies only where every step and detail of the state regulatory scheme involved is "required" or "compelled" (Pet. Brief, p. 15, U.S. Brief, p. 9). There is no merit to this contention. Indeed, such a rule would essentially nullify *Parker* since it is not practical for any regulatory agency to prescribe in advance absolute rules to govern "the multitudinous details" of vast and complex industries. *Cf. Federal Crop. Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947). Regulation by its very nature must remain flexible and leave room for some initiative in the regulated enterprises themselves—subject always to the controlling regulatory statutes—if regulation is not to stifle the very industries seen to be most affected with the public interest. Yet the preservation of this private initiative in no way alters the fact that the State has concluded that regulation under a public interest standard, not unrestricted competition, is required by the public convenience and necessity in those industries. The

application of *Parker* v. *Brown* depends upon this basic policy conclusion, backed by the power of the State acting "as sovereign" (317 U.S. at 352), not upon any requirement that the State prescribe each and every detail of a regulatory program to the exclusion of private initiative.

The decisions of the federal courts of appeals confirm this broad view of the scope of *Parker* v. *Brown*. *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 254 (4th Cir. 1971); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 941 (D.C. Cir. 1971); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 368-369 (9th Cir. 1974); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131, 137 (8th Cir. 1970); *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959); *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1017 (3d Cir. 1971).

The courts of appeals have also recognized that state public utility regulation is "a classic example of the *Parker* v. *Brown* exemption." *Jeffrey* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129, 1134 (5th Cir. 1975). See also *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971); *Business Aides, Inc.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir), *cert. denied*, 409 U.S. 1001 (1972).

None of the decisions of this Court cited by petitioner or the United States supports a contrary view. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), involved a situation in which the State had not enacted any policy substituting regulation for competition with respect to the legal profession. Similarly, in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), the State had not substituted regulation for

competition, but rather had attempted simply to approve conduct that constituted a violation of the antitrust laws—an attempt which *Parker* itself expressly condemned. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), did not involve the problem of accommodating the federal antitrust laws to state regulation but arose instead under the quite different state action concept embodied in the Fourteenth Amendment—a concept that is totally irrelevant to the issues here. *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 654 n.35 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). Finally, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), involved a Canadian law designed to promote competition, not one designed to substitute regulation for competition in the public interest. Significantly, none of these cases involved efforts to impose antitrust liability on a public utility, nor did any of them even suggest that such liability could be imposed upon an industry comprehensively regulated according to a public interest standard.

Nor do these cases support the proposition urged by the United States that antitrust liability can be imposed upon comprehensively regulated public utilities simply because the state regulatory agency fails to hold formal proceedings in discharging its regulatory responsibilities. This Court has recognized that the nature of state regulatory proceedings is a matter for the State to determine so long as constitutional limitations are not transgressed. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California*, 289 U.S. 287 (1933). *Cf. Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689 n.13 (1975).

The cases relied upon by petitioner and the United States thus leave unimpaired the basic principle that state public utility regulation is inconsistent with any effort to impose federal antitrust liability for matters subject to such regulation. Public utility regulation clearly satisfies all of the requirements which such cases indicate to be encompassed within *Parker* v. *Brown*: such regulation plainly could not have been enacted in

the absence of an affirmative state policy; and equally plainly, state public utility regulation has implicit in it all of the compulsory powers that the States can bring to bear. In these circumstances, the proper approach—and, indeed, the only approach that rightly gives effect to the power of the States to determine their own regulatory policies—is for this Court to follow *Parker* and expressly to reaffirm the principle that a state policy of comprehensive public utility regulation precludes the application of the federal antitrust laws.

The preservation of the principles underlying *Parker* v. *Brown* is important generally to the States and to industries regulated under state law, but it is particularly important—indeed vital—with respect to public utility regulation, which by definition involves a comprehensive scheme of regulation under a standard different from, and inconsistent with, the competition standard of the antitrust laws. Although competition is an important part of our system of law and economics, it is not now and never has been the only legally established method of assuring that economic resources yield public benefits.

The petitioner here has completely disregarded the basic rationale of public utility regulation, just as he has disregarded the Michigan Public Service Commission—the very agency set up by that State to protect the public interest in matters relating to public utility industries. In this situation, even if the Court were to feel that a question of local law might have been improperly resolved here, it should affirm the judgment below without prejudice to petitioner's raising the question before the Michigan Commission and obtaining a definitive resolution in accordance with the Michigan law. It is plain that petitioner's aim is to convert a regulatory matter into an antitrust claim in the hope of realizing a treble damage recovery—a result which might well cause the federal courts to be deluged with matters that could and should be resolved by state regulatory authorities, subject of course to judicial review.

The United States' decision to support petitioner as *amicus curiae* only reflects the effort of the Antitrust Division of the Department of Justice to impose its concept of competition upon all of American industry, whether regulated or unregulated. This runs flatly counter to the decisions of this Court respecting the power of the States to substitute regulation for competition where deemed necessary to serve the public interest within their respective borders. The Antitrust Division would have this Court, under the guise of the Sherman Act, reassume the very role which the Court properly disclaimed when it rejected the substantive due process philosophy in vogue prior to *Nebbia*.

The Court should reject such efforts to return it to the role of a superlegislature. The Court's decision in *Parker* v. *Brown* properly construes the Sherman Act in recognition of the long history of coexistence in our legal system of the competing values of competition and regulation, the importance under our laws of the constitutional principle of federalism, and the vital necessity of keeping antitrust standards requiring unrestricted competition out of the sphere of comprehensive regulation, if such regulation is to be workable and fair to all concerned.

ARGUMENT

In *Nebbia* v. *New York,* 291 U.S. 502 (1934), this Court upheld a law of the State of New York avowedly designed to eliminate "unrestricted competition" in the sale of milk in that State (291 U.S. at 538) by establishing "a Milk Control Board with power, among other things, to 'fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold' " (291 U.S. at 515). In upholding this statute, the Court rejected the contention that the States lack power to limit competition within their borders, saying (291 U.S. at 529, 538):

> "The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. . . .
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> * * * * *
>
> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside . . . ."

The *Nebbia* case was decided under the Due Process Clause and did not involve a direct attack upon state regulation under the federal antitrust laws. However, nine years later, such an attack did come before the Court in *Parker* v. *Brown,* 317 U.S. 341 (1943), a case remarkably similar to *Nebbia* except that it involved a state restriction upon competition in the marketing of raisins instead of milk. *Parker* arose out of the California Agricultural Prorate Act, an Act characterized by this

Court as authorizing "the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers" (317 U.S. at 346). In rejecting the contention that such an Act was inconsistent with the federal antitrust laws, the Court again upheld the power of the States to substitute regulation for competition where unrestricted competition is deemed to be contrary to the public interest.

The Court's holding in *Parker* made it clear that the federal antitrust laws could not be used to take the place of pre-*Nebbia* interpretations of the Due Process Clause (317 U.S. at 352):

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin* v. *Wallace,* 306 U.S. 1, 16; *Hampton & Co.* v. *United States,* 276 U.S. 394, 407; *Wickard* v. *Filburn, ante,* p. lll.
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith,* 195 U.S. 332, 344-45, cf. *Lowenstein* v. *Evans,* 69 F. 908, 910."

The *Parker* decision rests upon two basic principles: first, that the federal courts should respect the power of the States to substitute regulation for competition in any business within their respective borders where, in the judgment of the State involved, unrestricted competition will not serve the public interest; and second, that businesses regulated in the public interest should not be subjected to the inconsistent standards of the federal antitrust laws with respect to the very matters which the State has determined are not to be left to the kind of unrestricted competition that the antitrust laws were designed to promote in unregulated industries. The preservation of these principles is important generally to the States and to industries regulated under state law, but it is particularly important—indeed vital—with respect to public utility regulation, which by definition involves a comprehensive scheme of regulation that substitutes the public interest standard for the unrestricted competition standard of the antitrust laws with respect to the conduct of those businesses.

The first basic principle of *Parker* derives from the fundamental structure of the American system of government and reflects nothing more nor less than a due regard for the role of the States in that federal system. In this respect, *Parker* represents one aspect of a much broader line of decisions of this Court which have recognized that the power of the States to restrict competition and regulate local businesses in the public interest is not limited by generalized federal laws. See, *e.g.*, *Reid* v. *Colorado,* 187 U.S. 137, 148 (1902); *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249, 256 (1931); *New York State Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 413-414 (1973).

The same principle underlies many of this Court's constitutional decisions. As the Court is well aware, attacks upon state regulatory schemes restricting competition based upon the Due Process Clause were common and often successful in the early part of this century. However, since the repudiation of this basis for limiting state regulatory powers in the 1934

decision in *Nebbia* v. *New York,* the Court has consistently refused to compel the States to adhere to notions of a purely competitive economy under the Due Process Clause. The history of many of the decisions both before and after *Nebbia* is set forth in this Court's decision in *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). In that case, the Court expressly rejected the theory that state regulatory statutes must conform to a particular economic theory and held instead that the States are entitled to follow their own views of economics in regulating businesses within their borders (372 U.S. at 732).

The Court's refusal to limit the power of the States to regulate businesses in the public interest under the Due Process Clause has been parallelled by a consistent recognition that the Commerce Clause should not be used to accomplish the same result indirectly, at least where the businesses involved are essentially local. In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951), the Court rejected an attack upon state regulation under the Commerce Clause in a case arising under the very regulatory statutes that are in issue in this case. *Panhandle Eastern* involved an effort by an interstate gas pipeline company to sell its gas directly to large industrial customers in Michigan without obtaining a certificate of convenience and necessity from the Michigan Public Service Commission. As the Court viewed the case, it presented a direct conflict between an asserted federal right to engage in unrestricted competition and the State's power to prevent such competition in the public interest (341 U.S. at 334):

> "Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated."

The Court rejected the claimed federal right and upheld the power of Michigan to substitute regulation for competition—a power the Court described as a "vital interest to the State of Michigan" (*id.*).

The need reflected in *Parker* v. *Brown* to respect the power of the States to substitute regulation for competition is directly related both to *Nebbia* and to *Panhandle Eastern*. Indeed, in an early case applying this principle even before the decision in *Parker*, this Court itself recognized the relationship between efforts to limit state regulatory powers on constitutional grounds and attacks upon such powers under the Sherman Act. *Olsen* v. *Smith*, 195 U.S. 332 (1904). *Olsen* involved a state statute restricting competition in the provision of pilotage services which was attacked both on constitutional grounds, under the Commerce and Due Process Clauses, and on the basis of the then recently enacted Sherman Act. The Court treated the Sherman Act claim as essentially identical to the constitutional claim, pointing out that both claims rested upon a theory which "in its essence simply denies that pilotage is subject to governmental control" (195 U.S. at 344)—a theory which the Court firmly rejected (195 U.S. at 344-345). Thus, *Olsen* squarely holds that the power of the States to restrict competition in the public interest is no more limited by the Sherman Act than it is by the Commerce and Due Process Clauses of the Constitution itself.

The second principle of *Parker* v. *Brown*—that as to matters with respect to which the States have substituted regulation for competition, regulated companies should not be subjected to the inconsistent standards of the federal antitrust laws—is a necessary corollary of the first. Common sense, as well as the most elemental considerations of fairness, demand no less, since a company regulated by a public interest standard that subordinates competition to other public interest considerations cannot be expected simultaneously to serve two masters. This Court has itself recognized this fact in cases involving federal regulation. Thus, in two cases, decided only last Term, the Court held that the federal antitrust laws do not apply to activities subject to regulation under a standard different from and inconsistent with the standard of competition embodied in the antitrust laws.

In *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), the Court upheld dismissal of an antitrust claim based

upon the New York Stock Exchange's conduct in establishing fixed brokerage rates for transactions on the Exchange. Because this conduct was subject to the supervisory jurisdiction of and regulation by the Securities and Exchange Commission, the Court held it immune from attack under the antitrust laws, explaining its holding in terms of the fundamental inconsistency between the standard of competition embodied in the antitrust laws and the public interest standard upon which regulation is based (422 U.S. at 689-690):

> "If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. . . . [P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement the scheme."

On the same day, the Court handed down its decision in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), in which it upheld the dismissal of an antitrust attack upon certain practices subject to regulation by the SEC in connection with the sale and distribution of mutual fund shares. In the *NASD* case, the Court emphasized the pervasive regulatory scheme established by the federal securities acts governing these practices and held that "the Sherman Act has been displaced" by that regulatory scheme (422 U.S. at 734-735):

> ". . . we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. See *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973); *Pan American World*

> *Airways, Inc.* v. *United States,* 371 U.S. 296 (1963). In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated."

Although the *Gordon* and *NASD* cases both involved a problem of accommodating the federal antitrust laws to *federal* regulation, the principle announced and applied in those cases is equally applicable where *state* regulation is involved. The Court found it unnecessary to address this fact directly in the *Parker* decision itself, since that case was brought not against the regulated companies involved, but against the officials charged with the responsibility of implementing the State's regulation. However, the problem of a regulated company faced with duplicative and inconsistent standards is certainly no less severe when one of those standards is established by state law than it is when both standards arise under federal laws. Indeed, in its brief in the *Gordon* case, the Antitrust Division of the Department of Justice, appearing as *amicus curiae,* took the position that certain state regulation—specifically, the comprehensive regulation of public utilities—presented a much stronger case for holding the federal antitrust laws inapplicable than did the SEC's jurisdiction to oversee the New York Stock Exchange (Brief of the United States in No. 74-304, October Term, 1974, at 35-36).

The Court rejected the argument advanced by the Antitrust Division in *Gordon.* In doing so, however, it only further emphasized the principle underlying *Parker* that the standard of competition embodied in the antitrust laws cannot be applied to activities regulated in the public interest—a principle that has its plainest application where public utility regulation is involved. Thus, in *Gordon,* the Court held that even in the absence of a comprehensive, public utility-like system of governmental regulation, antitrust immunity may be necessary to protect regulated companies from the unfairness inherent in

being compelled to march to two different drummers (422 U.S. at 688-689). Hence, both the arguments and the decision in *Gordon* make it plain that the principle applied in that case is one of general application which establishes *a fortiori* that the federal antitrust laws do not apply to conduct of a public utility that is regulated under a comprehensive regulatory scheme.

The determination in *Gordon* and *NASD* that Congress intended to immunize the activities involved there from the antitrust laws is fully applicable here, even though this case involves state public utility regulation. Although the Court in *Parker* pointed out that the States do not have the power simply to approve violations of the antitrust laws (317 U.S. at 351), *Parker* confirms the States' power to remove businesses from the scope of those laws by subjecting their activities to regulation under a standard inconsistent with the antitrust standard of competition. So long as a State establishes meaningful regulation designed to protect the public interest, it cannot be seen as simply sanctioning a violation of the antitrust laws. Hence, there is only one difference between the power of the States and that of Congress to remove activities from the scope of the antitrust laws—namely, unlike Congress, a State cannot confer express antitrust immunity. State immunity resulting from the *Parker* principle must always be implied and must, in order properly to be implied, be accompanied by meaningful state regulation designed to protect the public.[1]

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[1] We agree with the position urged by the National Assocation of Regulatory Utility Commissioners in the brief it has submitted as *amicus curiae* here that the *Gordon-NASD* principles can be applied directly to state regulation of public utilities in view of the provisions of federal statutes incorporating such regulation as an integral part of congressional policy (NARUC Brief, pp. 28-33). The plan of these statutes further confirms the fact, recognized by the Court in *Parker,* that Congress never intended to limit the power of the States to regulate utilities in the public interest.

The present case represents an effort by petitioner, now supported by the United States as *amicus curiae,* sharply to cut back on the principle established in *Nebbia* and *Parker.* The light bulb replacement provision challenged here operates as a part of a comprehensive program established by the State of Michigan to regulate public utilities within that State. Indeed, this provision establishes a condition of service that is a part of the tariffs filed by respondent with the Michigan Public Service Commission and approved by that Commission to govern the rates at which respondent must provide and its customers must pay for electric service. As such, the light bulb replacement provision is an integral part of respondent's rates[2] and is no more subject to attack under the antitrust laws than the rates themselves.

The United States impliedly concedes that the light bulb replacement provision involved here was properly approved by the Michigan Commission, insofar as Michigan law is concerned. Nonetheless, it contends that the tariffs containing this provision can be attacked in a federal antitrust case on the theory that the State of Michigan has no affirmative policy that conflicts with such an application of the antitrust laws. This contention is stated as follows (U.S. Brief, pp. 10-11):

> ". . . the state has no special policy. There is no Michigan statute which either requires or favors the practice [of offering replacement bulbs as a part of the rate for electric service]. The Michigan legislature has never displayed any interest in the manner in which light bulbs are sold in the state. Similarly, the Michigan Public Utilities Commission *apparently* has no policy that either favors or opposes—let alone compels—the program. Indeed, that agency *apparently* has approved tariffs of other utilities that do not have a lamp exchange program (App. 51a)." (Emphasis supplied.)

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[2] *Western Union Telegraph Co.* v. *Esteve Bros. & Co.,* 256 U.S. 566, 571 (1921).

The uncertain position expressed with respect to both the policies of the Michigan Public Service Commission and the significance of that Commission's rulings is critical here, since that position simply glides over the single most important fact in this case—that is, the fact that the State of Michigan has decided that unrestricted competition is not an appropriate state policy for public utilities and has delegated to the Michigan Commission the power to restrict competition with respect to matters related to such industries as necessary to serve the public interest.

In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich. 650, 44 N.W. 2d 324 (1950), *aff'd,* 341 U.S. 329 (1951), the Michigan Supreme Court defined the powers of the Michigan Commission precisely in this way (44 N.W. 2d at 330):

> "The right to exclude . . . competition, where the general public convenience and necessities so require, has been delegated by the legislature to the Michigan public service commission."[3]

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[3] See also *Huron Portland Cement Co.* v. *Michigan Public Service Commission,* 351 Mich. 255, 88 N.W.2d 492, 499 (1958); *Indiana & Michigan Electric Co.* v. *Miller,* 19 Mich. App. 16, 172 N.W.2d 223, 226 (1969). In this respect, the policy of the State of Michigan is in no sense novel. Indeed, it is the same policy upon which all regulation of public utilities in this country is based—both state and federal—as recognized by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 282 (1932):

> "[U]nder certain circumstances free competition might be harmful to the community and . . . when it [is] so, absolute freedom to enter the business of one's choice should be denied."

In *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86 (1953), the Court speaking through Mr. Justice Frankfurter, emphasized this same policy as the basis for federal public utility regulation (346 U.S. at 92):

> "Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only

Hence, under Michigan law, the Commission is the *alter ego* of the legislature with plenary powers to implement the State's basic policy with respect to public utilities—that is, the policy that competitive considerations must give way "where the general public convenience and necessities so require."

In view of this definitive interpretation of Michigan law, it is almost incomprehensible that the United States can concede that the Michigan Commission has approved tariffs including bulb replacement provisions and has incorporated that approval in an order that these tariffs be published and adhered to and, at the same time, insist that "the program is not conducted pursuant to any affirmative state program or policy that requires it" (U.S. Brief, p. 12). Under Michigan law, the Commission's action in permitting the tariffs challenged here to become effective necessarily was based upon and reflects an implementation of the basic policy of the State of Michigan to the same extent as would be the case if the Michigan legislature itself had taken such action.[4] Once that action is taken, the tariffs themselves have the effect of law and become an affirmative part of the policy of the State.

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those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office . . . and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation."

[4] The United States' reference to the fact that the Commission "apparently has approved tariffs of other utilities that do not have a lamp exchange program" (U.S. Brief, p. 11) does not add to this contention. Indeed, this fact reinforces, rather than detracts from, the conclusion that the orders of the Michigan Public Service Commission reflect a basic state policy. The consistency of a light bulb program with the public convenience and necessity may properly be determined, not upon some generalized notion gleaned from average conditions throughout a State, but upon a careful evaluation of the facts and circumstances existing in each locality. Hence, the action of the Michigan Commission in limiting the light bulb replacement provisions to certain metropolitan areas only seems to confirm the conclusion that the Commission is discharging the responsibility placed upon it by the basic policy embodied in Michigan law—that is, the responsibility of insuring that the public convenience and necessity is served in all areas of the State by all public utilities operating within its borders.

Petitioner and the United States also contend that the principle established in *Nebbia* and *Parker* is not applicable here because Michigan's regulatory statutes permit public utilities to initiate tariffs subject only to approval by the regulatory commission, thus leaving the utility to that extent free to exercise its own private discretion. Essentially, their contention is that *Parker* v. *Brown* applies only where every step and detail of the state regulatory scheme involved is "required" or "compelled" by the State (Pet. Brief, p. 15; U.S. Brief, p. 9). There is no merit to this contention. Indeed, such a contention, if accepted, would essentially nullify the *Parker* principle, particularly as that principle applies to public utility regulation.

No statute regulating public utilities, state or federal, subjects every step and detail of the regulatory scheme to governmental compulsion. The very purpose of regulation is to provide a flexible and expert approach to problems too complicated for detailed resolution by a legislative body. *Secretary* v. *Central Roig Refining Co.*, 338 U.S. 604, 610 (1950). A regulatory agency can no more act solely through preannounced, compulsory rules and regulations that "define the multitudinous details appropriate" for regulation of vast and complex industries than could a legislative body itself. *Cf. Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). For this reason, public utility commissions must, if they wish to discharge their responsibility to regulate in the public interest, allow for some utility initiative in the formulation of proposals for tariffs and other regulatory activities, and this is invariably

the form that statutes regulating public utilities take. Indeed, initiative permitted utilities under Michigan law—a feature emphasized here by petitioner and the United States as making the antitrust laws applicable to activities subject to regulation by the Michigan Commission—is present in every state regulatory statute.[5]

The initiative of a public utility under a comprehensive regulatory scheme is no more subject to the federal antitrust laws than conduct resulting directly from an order of a regulatory commission. Since the purpose of public utility regulation is to protect the public interest rather than any private interests, be they those of the utility or those of the utility's would-be competitors, the overriding obligation of a utility is to serve this governing standard. The utility must therefore exercise any initial discretion left to it under the regulatory

[5] Similar provisions permitting utility initiative in rate-making subject to regulatory control are also present in the federal statutes that regulate public utilities. Thus, federal statutes typically provide that the regulated company shall file a tariff or schedule of rates, terms or conditions of service with the agency which shall automatically become effective after a prescribed notice period unless suspended, rejected or modified by the agency. See, *e.g.*, 16 U.S.C. § 824d (Federal Power Act), 15 U.S.C. § 717c (Natural Gas Act), 49 U.S.C. §§6, 317, 318, 906 (Interstate Commerce Act), 47 U.S.C. §§ 203 (Communications Act of 1934), 49 U.S.C. § 1373 (Federal Aviation Act), 46 U.S.C. § 817 (Shipping Act of 1916). The role of the regulated company in initiating changes in rates and services under these statutes has been consistently recognized by this Court and the courts of appeals. See, *e.g.*, *American Tel. & Tel. Co.* v. *FCC*, 487 F. 2d 865, 880 (2d Cir. 1973) ("In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions."); *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 672 (1973) ("Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads."); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956) ("all rates [under the Natural Gas Act] are established initially by the natural gas companies").

scheme in accordance with the public interest standard, even though the result may be that a tariff it proposes to serve the public interest may have adverse consequences to would-be competitors. The regulatory commission, of course, has the ultimate power to determine whether the public interest is truly served by such a tariff; but the federal antitrust laws cannot properly be applied to the utility's conduct in proposing the tariff, either before it becomes effective or afterwards. To hold otherwise would subject the utility's conduct to a standard that under state law it was not and could not properly have been designed to satisfy. A plainer example of the imposition of "duplicative and inconsistent standards" contrary to the principles of this Court's decisions in *Gordon* and *NASD* could hardly be imagined.

Thus, the presence of such private initiative cannot and does not render conduct subject to comprehensive public utility regulation liable to prosecution under the federal antitrust laws. Indeed, this is apparent from the *Parker* decision itself, since the agricultural program involved in that case, although enforced by state officials, also involved the activities of numerous private parties, who, subject to the ultimate power of the State to approve and control the program, were given substantial initiative and discretion. Indeed, as the Court pointed out, a "program committee" composed of private producers formulated and administered the program subject to approval by state officials (317 U.S. at 346-347). Nonetheless, the Court held that since the activities involved were subject to regulation by California under this program, the federal antitrust laws were inapplicable.

The decisions of the federal courts of appeals reinforce the conclusion that the applicability of the principle of *Parker* v. *Brown* does not depend upon the existence of compulsion in every step and detail of a state regulatory program. A widely cited case setting forth the scope of the *Parker* v. *Brown* principle is *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25

(1st Cir.), *cert. denied*, 400 U.S. 850 (1970). There, the court described *Parker* as follows (424 F.2d at 30):

> "Our reading of *Parker* convinces us that valid government action confers antitrust immunity ... when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."

The *Whitten* court did not state, or even suggest, that the "alternate form of public regulation" provided must contain compulsion as to every step and detail of such regulation. Quite the contrary, the court expressly recognized that state "delegation and approval [of the kind involved] in *Parker*" (424 F.2d at 31) is sufficient to render the federal antitrust laws inapplicable.

Whitten has been quoted, cited or paraphrased by every court of appeals that has dealt with *Parker* since that decision. See, *e.g.*, *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 254 (4th Cir. 1971); *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931, 941 (D.C. Cir. 1971); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 368-369 (9th Cir. 1974); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131, 137 (8th Cir. 1970); *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1017 (3d Cir. 1971). See also *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959).

Public utility regulation, by its very nature reflects a recognition that competition is not "the *summum bonum*" in any industry to which it is applied. Hence, the courts of appeals have consistently applied *Parker* v. *Brown* to cases involving utilities. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135, (5th Cir. 1971); *Business Aides, Inc.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001

(1972); *Jeffery* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129 (5th Cir. 1975). The Fifth Circuit's opinion in *Jeffrey* is particularly apposite here, for it expressly recognizes the precise principle which should control this case (518 F.2d at 1134):

> "Regulation by a governmental body of the rates to be charged by a public utility are a classic example of the *Parker* v. *Brown* exemption."

All of these cases support the view that under *Parker* v. *Brown*, the federal antitrust laws have no application to the pervasively regulated conduct of a public utility. Moreover, none of the cases cited by petitioner or the United States supports a contrary view. Petitioner relies upon *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Schwegmann* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). The United States also relies upon *Goldfarb*, but in addition cites *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Significantly, none of these cases even involved the question of whether activities resulting from and subject to a comprehensive scheme of public utility-type regulation could be made the basis of a charge of violation of the federal antitrust laws. Nor do the cases, when analyzed, provide any basis for concluding that this Court has restricted *Parker* v. *Brown* so as to render it inapplicable to such activities.

In *Goldfarb*, this Court was confronted with the question of "whether a minimum fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates § 1 of the Sherman Act . . ." (421 U.S. at 775). The State of Virginia had not adopted a public utility-like regulatory scheme with respect to the legal profession and did not regulate the fees of lawyers. In rejecting the claim that *Parker* v. *Brown* conferred antitrust immunity upon such activities, the Court pointed out that the activities of the State Bar amounted to nothing more than "foster[ing] anticompetitive practices for the benefit of its members" (421 U.S. at 791). During the course of its discussion, the Court stated that in

order to be entitled to antitrust immunity "anticompetitive activities must be compelled by direction of the State acting as a sovereign" (*id*).

The Court in *Goldfarb* did not purport to overrule or limit *Parker* v. *Brown* in any way. Quite the contrary, the Court cited that case as the controlling precedent in its decision and pointed out that *Parker* v. *Brown* "held that an anticompetitive marketing program which 'derived its authority and its efficacy from the legislative command of the state' was not a violation of the Sherman Act . . ." (421 U.S. at 788). It is thus apparent that this Court in *Goldfarb* was not suggesting, as petitioner and the United States here contend, that *Parker* applies only where state compulsion applies to each step and detail of a state regulatory scheme. Rather, as is apparent from the approval of and reliance upon the language of *Parker,* the Court's holding in *Goldfarb* was that only those allegedly anticompetitive activities which are subject to regulation under a statutory scheme adopted and enforced by the State are entitled to federal antitrust immunity.

As pointed out above, this was the precise holding of *Parker* v. *Brown.* As such, this holding is plainly applicable in a situation such as that presented here where an antitrust complaint is specifically directed at the effective tariffs of a public utility. Although the tariffs may initially be filed by the public utility, "it is the state," to use the words of *Parker,* "acting through the Commission, which adopts the [regulatory] program and which enforces it with penal sanctions" (317 U.S. at 352). The public utility is compelled by law to observe its tariffs scrupulously so long as they are in effect, and it is prohibited by law from enforcing any tariff that has been declared to be unlawful by a public utility commission of competent jurisdiction.[6] As in *Parker,* these laws are generally backed by penal sanctions.

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[6] This Court has itself repeatedly recognized in cases involving federally regulated utilities that public utility tariffs have the force of law, whether prescribed or merely accepted by the regulatory agency. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951); *Keogh* v. *Chicago & N.W. Ry. Co.,* 260 U.S. 156, 163 (1922); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516, 520 (1939); *Crancer* v. *Lowden,* 315 U.S. 631, 635-36 (1942). The same principle is recognized in Michigan in its regulation of electric utilities, as indeed it is generally recognized in all state regulation of public utilities. M.C.L. 460.557.

The *Schwegmann* case relied upon by petitioner is equally inapplicable here. Indeed, the *Schwegmann* case is an even more extreme example than *Goldfarb* of the precise situation envisioned by the Court in *Parker* when it pointed out (317 U.S. at 351):

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."

The state law involved in *Schwegmann* authorized private parties to enforce retail price maintenance agreements upon competitors who would not become parties to such agreements —a practice which the Court found to be a *per se* violation of the antitrust laws. As in *Goldfarb,* the state law did not purport to regulate either the prices of those involved in such price-fixing agreements or the rate of return that they might earn. Hence, the Court concluded in *Schwegmann,* as it concluded in *Goldfarb,* that the state involvement constituted at most an authorization for a private party to violate the federal antitrust laws without affording any protection to the public—the very power which *Parker* v. *Brown* expressly held to be beyond those properly remaining to the States.[7]

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[7] This is precisely the ground upon which the Court of Appeals for the Third Circuit distinguished *Schwegmann* from *Parker* v. *Brown* in *Norman's on the Waterfront, Inc.* v. *Wheatley,* 444 F.2d 1011, 1016-1018 (1971).

Schwegmann plainly has no application to the situation in the case at bar. Both the rates and the rate of return of public utilities such as Detroit Edison are comprehensively regulated by state commissions in the public interest, as, indeed, is the right of utilities to provide service to the public and all terms and conditions of that service. Monopoly profits are impossible in such a situation, as is control over the market *vis-a-vis* any competitors the commission might permit to serve the utilities' customers. Significantly, neither petitioner nor the United States suggests that this case involves a situation in which state law is simply sponsoring anti-competitive practices.

The *Jackson* case relied upon by the United States is similarly inapposite to any issue involved in this case. As the Court of Appeals for the Seventh Circuit, sitting *en banc*, pointed out in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 654 n.35 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973), a case specifically noted by this Court in *Jackson*, (419 U.S. at 349 n.6), there is a basic difference between the state action standard applied under the Fourteenth Amendment and the question of antitrust immunity under *Parker* v. *Brown* based on a State's comprehensive public utility regulation.[8] Hence, the considerations that led the Court in *Jackson* to hold the Fourteenth Amendment's restrictions upon state action inapplicable to practices of a regulated utility "where the initiative [for such practices] comes from it and not from the State" (419 U.S. at 357) have nothing whatever to do with the applicability of the Sherman Act to activities subject to comprehensive public utility regulation. Indeed, if the issue involved in *Jackson* had been the same as that involved here, the Court could not have decided *Jackson* as it did without overruling *Parker* v *Brown*, since *Parker* itself involved a state program that rested upon private initiative.

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[8] The directness of a State's involvement in a particular practice is an appropriate standard when determining whether the State has an obligation under the Fourteenth Amendment to accord a person affected by that practice a fair hearing. As the Court pointed out in *Jackson*, it may be a practical impossibility to provide hearings in all matters regulated by the State where the State itself is not directly involved (419 U.S. at 354-355). In such circumstances, the Court's holding that the existence of utility initiative places limits upon governmental responsibility under the Fourteenth Amendment is entirely sound. In the antitrust context, however, which brings into play a need to accommodate statutory schemes reflecting two different and inconsistent standards, the existence of ultimate authority and control in the State requires that the antitrust laws not be applied. Ultimate responsibility for the regulation of the industry involved is the key, and in this context that responsibility clearly rests with the State in its enforcement of the public interest standard of its regulatory statutes.

Moreover, the argument advanced here by the United States on the basis of *Jackson* should be rejected for the additional reason that it assumes powers and responsibilities in this Court which the Court repeatedly and deliberately has refused to assume. In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California*, 289 U.S. 287 (1933), the Court carefully delineated its proper role in reviewing quasi-legislative determinations such as utility rate-making (289 U.S. 304):

> "The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed."

In refusing to review the "process" by which the State of California had exercised its "legislative discretion" so long as "constitutional limitations are not transgressed," the Court announced a principle which ever since has consistently guided its review of state rate-making decisions.

The United States' argument that reliance upon utility initiative in the rate-making process renders state rate determinations susceptible to the federal antitrust laws would

effectively nullify the principle of *Los Angeles Gas.* Acceptance of such an argument would permit the federal courts to enjoin state rate-making orders—just as such an injunction is sought here—not on the ground that the order violates the Constitution, but merely because it might have anti-competitive consequences and the State has permitted private parties to propose the order before it was permitted to become effective by the state regulatory commission. With all due respect, this argument is absurd. It is no more the proper function of the federal courts to enjoin a tariff having the status of law under a state regulatory scheme because it was initiated by a private party than it is to enjoin a state law proposed by a private party, even if anti-competitive consequences ensue. Nor can the federal courts properly interfere with either process by punishing the private parties involved for making such proposal. *Cf., Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965).

The United States' argument based upon *Jackson* is thus unsound both because it is inconsistent with *Parker* v. *Brown* and because it would project this Court into an area in which it has previously determined that it has no proper concern—that is, the *process* by which legislative and quasi-legislative decisions are made by the States. The same considerations require the Court to reject petitioner's related argument that the State here has acted out of "ignorance" (Pet. Brief, p. 24). The Court cannot and should not indulge such an assumption in any case. It certainly should not do so where the record affirmatively shows that the Michigan Commission investigated the practice here under attack.[9]

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[9] As the district court pointed out (App. 57a-58a), the Michigan Commission's specific attention to the light bulb plan is amply demonstrated by its treatment of Detroit Edison's request to modify the plan for commercial users in 1964. At that time, the Commission required Detroit Edison to submit information "on the direct costs of that plan" and, although no "formal hearing" was held (App. 57a-58a, 135a), it considered this information before ordering that "lamp replacements of approved burned out incandescent lamps will no longer be furnished under this rate schedule" (App. 336a).

Certainly, the fact that the Michigan Commission did not hold formal proceedings and issue an affirmative order expressly compelling Detroit Edison to institute and maintain the challenged light bulb program is of no significance here. In the *Gordon* case, this same argument was advanced with respect to the Securities and Exchange Commission's supervision of the New York Stock Exchange's fixed commission rate plan. In that case, the SEC pointed out in its *amicus curiae* brief that requiring formal hearings or orders as a prerequisite to giving full effect to the regulation would interfere with the regulatory agency's efficient functioning and might make it impossible for it properly to do its job, and this Court concluded that "immunity should not rest on the existence of a formal order" (422 U.S. at 689 n.13). The Court's holding in *Gordon* that no such formal proceedings and orders are necessary applies *a fortiori* to state public utility regulation. Surely, Congress did not intend by enactment of the Sherman Act to impose rigid procedural requirements upon the exercise of the public health and welfare power by state regulatory agencies, if, indeed, it could even constitutionally do so.[10]

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[10] Petitioner is also plainly wrong in contending that the absence of such a proceeding violated state law (Pet. Brief, pp. 6-7, 12-13). Michigan law states only that the Michigan Public Service Commission has jurisdiction over the rates and "rules and conditions of service" of electric utilities (M.C.L. § 460.551), and that a utility may not put any rate into effect "without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or change" (§ 460.552). The law does *not* require the Michigan Public Service Commission to hold a hearing

Finally, *Continental Ore* provides no support whatever for the United States' argument that the principle of *Parker* v. *Brown* "applies only where the state compels the anticompetitive conduct and not where it merely authorizes or approves such conduct" (U.S. Brief, p. 8). The *Continental Ore* case involved an alleged conspiracy to monopolize the vanadium market through, among other means, the exclusion of Continental from the Canadian market. This exclusion was allegedly accomplished by a Canadian subsidiary of one of the conspirators which had been authorized by the wartime Canadian Metals Controller to purchase and allocate all vanadium required by Canadian industry. The decision of this Court that a conspiracy to monopolize this market under these circumstances was subject to the antitrust laws is in no way inconsistent with *Parker* v. *Brown* or any of the other cases cited and discussed above. Plainly, the Canadian law involved in *Continental Ore* was designed not to limit competition in vanadium but to allocate the available resources so as fairly to prorate the shortage that existed among all companies using those resources. Thus, the Court held (370 U.S. at 706):

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or make a record of its deliberations in determining to grant such affirmative approval. Instead, the Public Service Commission is granted "power and authority to make, adopt and enforce rules and regulations for the conduct of its business and the proper discharge of its functions hereunder . . ." (§ 460.557). Administrative agencies such as the Michigan Public Service Commission regularly carry out much—if not the bulk—of their regulatory responsibilities in proceedings and deliberations of which transcripts are not made. Accordingly, the absence of a transcript or other similar record is no basis for a conclusion that the Michigan Public Service Commission has proceeded "in ignorance" (Pet. Brief, p. 24).

> "[T]here is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped."

The *Continental Ore* case is thus clearly distinguishable from this case which involves an industry in which Michigan law has decreed that regulation in the public interest, not competition, should be the governing standard. and one in which the Michigan Commission not only "would have approved" but did in fact approve the very practices involved here.[11]

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[11] Nor do the lower federal court cases relied upon by the United States support its efforts to restrict the proper scope of the principle of *Parker* v. *Brown*. Indeed, the United States grossly misstates the *Whitten* case, commingling the question of the existence of an affirmative state policy with the question of compulsion in such a way as to create the impression that *Whitten* holds *Parker* v. *Brown* to be applicable only where the State has enacted a statute in which all private action involved is specifically compelled by state law. *Whitten* stands for no such doctrine. Quite the contrary, as discussed above, *Whitten* makes it plain that the Court of Appeals for the First Circuit understands *Parker* v. *Brown* to apply where a State displaces competition "and deliberately attempts to provide an alternate form of public regulation"—whether every single aspect of that regulation is compulsory or not. In that respect, *Whitten* does not reflect a "contrary view" (U.S. Brief, pp. 9-10, n.1) to that taken by the Fourth Circuit or any other court of appeals. With respect to the district court cases relied upon, the United States is only partially accurate in its citations. Thus, *United States* v. *Pacific Southwest Airlines,* 358 F. Supp. 1224, 1228-1229 (C.D. Cal.), *cert. dismissed,* 414 U.S. 801 (1973), quotes from and relies upon *Whitten* as setting forth "the underlying rationale" of *Parker* v. *Brown*. The other two district court decisions relied upon by the Government, *Travelers Insurance Co.* v. *Blue Cross of Western Pa.,* 298 F. Supp. 1109 (W.D. Pa. 1969), and *Marnell* v. *United Parcel Service,* 260 F. Supp. 391 (N.D. Cal. 1966) (U.S. Brief, p. 10), are correctly cited by the United States but both were decided before *Whitten* and court of appeals decisions consistent with *Whitten* in the Third and Ninth Circuits and thus do not reflect a controlling or correct understanding of the principle of *Parker* v. *Brown*.

A thorough review of the cases relied upon by petitioner and the United States thus leaves unimpaired the basic principle that state public utility regulation is inconsistent with any effort to impose federal antitrust liability for matters subject to such regulation. Public utility regulation clearly satisfies all of the requirements which these cases indicate to be encompassed within *Parker* v. *Brown:* such regulation plainly could not have been enacted in the absence of an affirmative state policy; and equally plainly, state public utility regulation has implicit in it all of the compulsory powers that the States can bring to bear. In these circumstances, the proper approach—and, indeed, the only approach that rightly gives effect to the power of the States to determine their own regulatory policies—is for this Court to follow *Parker* and expressly to reaffirm the principle that a state policy of comprehensive public utility regulation precludes the application of the federal antitrust laws.

The preservation of the power of the States to enact comprehensive public utility regulation is critical. Important as the principle of competition is in American economic life, it is not now, and never has been, the only legally established method of assuring that economic resources yield public benefits. The historical antecedents of the modern regulation of public utilities can be traced far back into history—to the medieval doctrine of the "just price," and the pervasive controls of the mercantilist state. By the time that the concept of competition came to be regarded in Anglo-American thought as a regulator of price, quality and the efficient allocation of resources (see Adam Smith, *Wealth of Nations* (1776)), the concept of businesses "affected with a public interest" and thereby subject to regulation was also firmly established in the common law. See Lord Hale, *De Portibus Maris* (written prior to 1676, published in 1776), quoted in *Munn* v. *Illinois,* 94 U.S. 113, 125-126 (1877).

The petitioner in this case has simply ignored the distinction between industries in which unrestricted competition is

appropriate and those in which such competition has been determined to be contrary to the public interest. Indeed, petitioner did not even bother to challenge Detroit Edison's plan before the Michigan Public Service Commission—a fact which we submit reveals more plainly than anything said in his brief the true nature and purpose of this case.[12] Petitioner is not interested in determining whether Detroit Edison's plan serves the public interest of the people of Michigan. Instead, it is quite apparent that his principal concern is to convert an obvious regulatory matter into an antitrust matter in an effort to recover treble damages under the antitrust laws.[13] In this respect, the case is not different from *Gordon* and countless others that have been filed in recent years. We submit that if this trend is encouraged, the courts will be flooded with litigation and the regulatory process will be essentially stultified.

That the United States as *amicus curiae* has seen fit to support petitioner does not alter these conclusions. The brief of the United States apparently reflects the view of the Antitrust Division of the Department of Justice that unrestricted com-

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[12] This fact alone should be sufficient to dispose of most of petitioner's contentions in this case. For, even if this Court should feel that there are questions of local law involved here that may have been decided improperly, it should affirm the judgment below without prejudice to the petitioner's raising those questions before the Michigan Public Service Commission. In that way, the questions could be resolved in the proper fashion under Michigan law by the tribunals best equipped to resolve them, with a right to appeal ultimately to the Supreme Court of Michigan by anyone dissatisfied with that resolution. Unless and until the responsible Michigan authorities decide that the provision of light bulbs should be separated from the public utility services of electric utilities in Michigan, this Court should not upset the long standing practice of that State.

[13] Counsel for petitioner virtually admitted as much in the argument before the district court when pressed by the trial judge as to the reason for petitioner's failure to proceed before the Michigan Public Service Commission (App. 174a-175a).

petition is the only economic theory permissible in this country.[14] This view has led the Antitrust Division, as well as many plaintiffs, to treat the federal antitrust laws as though they are constitutional provisions and, on that basis, to ask the courts to overturn regulatory laws on the theory that they limit competition. We submit that this effort is both improper and unsound, since it would inevitably transform this Court into a "superlegislature to weigh the wisdom of legislation" (*Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421, 423 (1952))—the very role which this Court disclaimed when it rejected the substantive due process philosophy. Yet that is the role which the Antitrust Division would force back upon the court by its position in this case.

This Court should make it plain that efforts to exalt the antitrust laws above state and federal regulatory statutes will not be permitted to succeed. As this Court pointed out more than seventy years ago in upholding the state regulation involved in *Olsen* v. *Smith* (195 U.S. at 345):

> "When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

This case thus raises issues that are far more important than the Michigan light bulb plan that is here being attacked. The Court's decision in *Parker* v. *Brown* recognizes the long

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[14] See, *e.g.*, testimony of Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division before the Subcommittee on Antitrust Monopoly Senate Judiciary Committee on S. 2028, presented on December 10, 1975.

history of coexistence in our legal system of the competing values of competition and regulation, the importance under our laws of the constitutional principle of federalism, and the vital necessity of keeping antitrust standards based upon the notion of unrestricted competition out of any sphere of comprehensive regulation if such regulation is to be workable and fair to all concerned. The Court should reaffirm this decision in unmistakable terms.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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No. 75-122

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY,

Respondent.

RESPONSE OF PETITIONER TO THE MOTIONS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS ("NARUC") AND THE MOTION OF "MICHIGAN UTILITIES GROUP" FOR LEAVE TO FILE AMICUS CURIAE BRIEFS AND IN THE ALTERNATIVE FOR LEAVE TO THE PETITIONER TO FILE RESPONSES THERETO FOLLOWING ORAL ARGUMENT

Now comes the Petitioner, Lawrence Cantor, d/b/a Selden Drugs Company, by his attorneys and for his statement in opposition to the motions of NARUC and the "Michigan Utilities Group" for leave to file amicus briefs states as follows:

1. This response is typed in accordance with Rule 4 in that time did not allow preparation of a printed response.

2. The Rules of the Supreme Court of the United States, specifically Rule 42, requires amicus briefs be filed within the time provided for the filing of the brief of the party supported. The date upon which Defendant, the Detroit Edison Company ("Edison") was required to file its brief in this proceeding was December 22, 1975. Edison filed a motion requesting an extension of time for the filing of its brief, but this motion was not granted. Accordingly, the motions seeking leave to file amicus curiae briefs and the briefs

themselves were required by the Rules of this Court to be filed on or before December 2?, 1975. These motions and briefs are therefore untimely in that they were not filed until sometime after January 1, 1976.

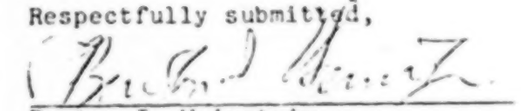
3. Edison, despite the fact that its motion for an extension of time was not granted, did not provide its brief to the Petitioner until January 5, 1976. As a result, Petitioner in addition to being burdened with the necessity of filing its response to Edison's brief on or before January 10, 1976 in conformity with the Rules of the Supreme Court of the United States must now deal with two additional briefs which, it is alleged by the moving parties, raise issues to which Edison has not or may not have addressed itself. Accordingly, Petitioner will be severely prejudiced by granting leave at this late date to the movants.

4. The fears of the movants that points raised in their briefs have been or may be inadequately covered by the brief of Edison are groundless. NARUC claims that the position of the Petitioner is an attack upon rates and rate schedules and upon state regulatory jurisdiction (see page 3 of the motion and brief of NARUC). The Michigan Utility Group argues that Edison's brief "may not adequately deal with the... question of the applicability of the federal antitrust laws to the activities of public utilities resulting from and subject to regulation by a state public utility commission". Edison's brief deals at length with each of the issues with which the movants are concerned. See pages 36 through 40 and pages 47 through 59 of Edison's brief.

5. Petitioner does not object specifically to the filing of the amicus briefs, but certainly, due to lateness and subject matter question their rights to do so and therefore cannot consent to said filings.

WHEREFORE, the motions of NARUC and the Michigan Utilities Group for leave to file amicus curiae briefs should be denied. In the alternative, should this Court grant the motions of either or both of the movants, Petitioner respectfully requests that it be given a reasonable length of time following oral argument in which to file its response to such amicus curiae briefs as the Court permits to be filed.

Respectfully submitted,



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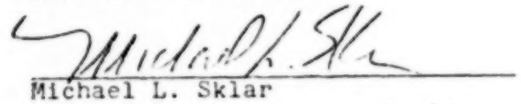

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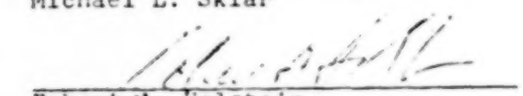
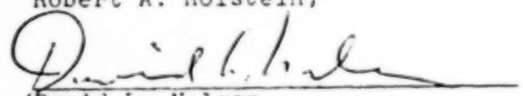


Robert A. Holstein,



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PROOF OF SERVICE BY MAIL

I, Harriett R. Wessling, a non-attorney, on oath state: I served a copy of the attached Response of Petitioner to the Motions of the National Association of Regulatory Utility Commissioners ("NARUC") and the Motion of "Michigan Utilities Group" for Leave to File Amicus Curiae Briefs and in the Alternative for Leave to the Petitioner to File Responses Thereto Following Oral Argument by mailing a copy of said Response to each person required to receive copies of all filings* and depositing same in the United States mail at 6 North Michigan Avenue, Chicago, Illinois at 5:00 p.m. on January 6, 1976, with proper postage prepaid.

Harriett R. Wessling

Signed and sworn to before me
this 6th day of January, 1976.

Notary Public

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No. 75-122

In the

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OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

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vs.

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER TO THE BRIEFS OF THE MICHIGAN UTILITIES GROUP AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE

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IN THE

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REPLY BRIEF OF PETITIONER TO THE BRIEFS OF THE MICHIGAN UTILITIES GROUP AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE

The issue which is presented to the Court is whether a public utility can obtain antitrust immunity for an activity referred to in its approved tariff in the absence of a legislative command or considered regulatory inquiry. Petitioner claims that under the doctrine of *Parker* v.

Brown the answer is no. The *amici curiae* claim that the answer is yes.

The position of the National Association of Regulatory Utility Commissioner's (hereinafter "NARUC"), is that in determining whether an anticompetitive activity is entitled to immunity "separate weight" must be given to the fact that the perpetrator is a "heavily regulated" company (NARUC brief, page 22). The Michigan Utilities Group goes further and suggests that private initiative in furtherance of or under color of a state regulatory scheme should be exempt from the antitrust laws. Both positions amount to an extension of antitrust immunity far beyond the limits of *Parker* v. *Brown* and *Goldfarb* v. *Virginia State Bar Association,* 421 U.S. 773 (1975).

To its credit, NARUC admits, by calling for a "special weight" to be given to the utility status of the defendant, that its suggestion is a departure from the holding in *Parker*. The Michigan Utilities Group, on the other hand, finds legitimacy for its proposition by misstating the holding in *Parker* v. *Brown*. Thus, in the first paragraph of its Summary of Argument the Michigan Utilities Group claims that *Parker*:

> ". . . held that the federal antitrust laws do not apply to conduct resulting from and subject to . . . regulation." (Michigan Utilities Group, brief page 5)

The antitrust exemption in *Parker* v. *Brown* does not rest, as the Michigan Utilities Group claims, on the principle that a state may substitute regulation for competition in a particular industry, nor does it rest upon the notion that an industry should not be subject to competing codes of regulation. However worthy these notions might be, in certain situations not applicable here, the antitrust holding in *Parker,* as confirmed by this Court in *Goldfarb,*

rests on the proposition that the antitrust laws do not apply to activities in which a state engages or which, acting as a sovereign, it commands. Moreover, it is unnecessary in the instant case to consider the notions of substituting regulation for competition or the purported evils of placing an innocent business under the whip of competing regulatory masters. The record here overwhelmingly demonstrates an absence of regulation or command by the State of Michigan over Respondent's light bulb program—an absence which neither *amici curiae* successfully rebut.[1]

Turning to the exact issue in this case, Petitioner suggests that, while there is no reason for departing from the basic *Parker-Goldfarb* test of "sovereign command"—

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[1]NARUC does not attempt a rebuttal. The Michigan Utilities Group in a footnote (b. p. 32, n.9), cites certain findings in Judge Feikens' opinion that the MPSC "required Detroit Edison to submit information 'on the direct cost of that plan'" in connection with the 1964 rate modification in which the bulb program was made optional for commercial customers. As Petitioner here pointed out in its brief to the Court of Appeals, Judge Feikens was apparently mistaken.

There is no evidence of any review or consideration by the MPSC given to Edison's 1964 request other than issuance of the order itself. Ronald Daniels, Edison's supervisor of the Rate and Revenue Requirement Department (Appendix 91a), testified on deposition that no cost data was submitted in connection with the 1964 request. (Appendix 111a) Judge Feikens, contrary to his own statement at the time of Oral Argument and apparently without regard for the admission by Daniels, found in his Memorandum Opinion that substantial cost data was filed in support of the 1964 rate change request. (Appendix 57a-58a) Regardless, even if such facts were submitted in connection with the 1964 tariff modification, that should not be the basis upon which this case should turn. Antitrust immunity should require continual regulation and review of Edison's changing program, not merely a one time review of part of its costs.

some special analytic tools might be useful in determining whether the exemption applies to a particular activity of a regulated utility. Thus, the Court can and should inquire first how pervasively regulated was the *particular activity* under attack and secondly, to what degree was the state involved in implementing and carrying out the program. Applying these tests to the facts in this case does not require either a careful weighing or the drawing of fine distinctions. It is clear that there is no shield from the antitrust laws under the *Parker* doctrine for Respondent's light bulb program.

Both *amici curiae* briefs suggest that Petitioner's claim is an attack upon the principle which this Court announced in *Nebbia* v. *New York,* 291 U.S. 502 (1934), and that Petitioner is attempting to cloak an attack on well settled Constitutional principles in the clothing of an antitrust action. As has been amply demonstrated, there is no state policy in Michigan with respect to light bulb distribution. There is certainly no statute dealing with light bulbs in Michigan. The absence of a similar program by any other private utility in Michigan, which was admitted by Respondent's Assistant Vice President in charge of customer services (Appendix 162a), is further proof, if any is needed, of the absence of a state policy and state concern with light bulb distribution.[2]

[2] Edison did not mention its light bulb program in its tariffs until 1916, seven years after Edison's electricity business became subject to regulation. NARUC was thus mistaken in its facts when it assumed that regulation of electricity and inclusion of the bulb program in Edison's tariffs were contemporaneous events. This is significant, for it further demonstrates the lack of interest of the State of Michigan in light bulbs as well as the fact that it was apparently Edison who decided to mention the program for the first time in its tariffs.

Accordingly, Petitioner has not and need not raise any Constitutional objections to the program of the kind that faced this Court in *Nebbia* v. *New York.* This becomes a *Nebbia* case only if the Court accepts the extreme position of the Respondent and the *amici curiae* that *any* activity of a regulated industry adopted pursuant to a general regulatory scheme would be exempt from the antitrust laws.[3]

There remains only one more argument common to both *amici curiae* briefs to which the Petitioner will address himself: the applicability of *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975) and *United States* v. *National Association of Security Dealers,* 422 U.S. 694 (1975). Both *amici curiae* briefs cite these cases for the

[3] While it is not an issue in the current case, it is interesting to speculate on what posture the federal courts and this Court might take had the State of Michigan or any state enacted a statute that restricts competition in the distribution of light bulbs or for that matter, phonograph record players or refrigerators. *Nebbia* is grounded on the proposition that:

> "that if the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend destruction of the industry itself, appropriate statutes passed in an honest effort to correct the consequences may not be set aside. . ." 291 U.S. @ 535.

It would seem that if a statute regulating light bulb distribution was not grounded in an honest effort to promote some public good, the federal courts would not be precluded under *Nebbia* from striking such legislation down either on Constitutional grounds or, using the supremacy clause, as being in conflict with the antitrust laws. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951).

proposition that antitrust immunity can be implied from broad regulatory statutes for privately initiated anticompetitive conduct. The application of these cases to the instant case is incorrect. In *Gordon*, the court permitted an exemption for fixed commission arrangements of the New York Stock Exchange on a record which showed a specific statutory provision, Section 19(b) of the Securities Exchange Act of 1934, which authorized the SEC to supervise the exchanges in the fixing of reasonable rates of commission, plus an extensive record of SEC activity in reviewing the practice under attack and substantial Congressional review of the SEC's supervision of the practice. In stark contrast, there is no legislative reference in Michigan to light bulbs, the MPSC has not exercised any continuing regulatory review of the program, nor has the Michigan legislature taken any action with respect to the MPSC's conduct in this matter analogous to that which Congress took in *Gordon*. The concurring opinions of Justices Douglas and Stewart are particularly illuminating here. Mr. Justice Douglas wrote to emphasize the single factor which for him was of prime importance:

> "The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing those rates from antitrust challenges. The antitrust laws are designed to safeguard a strong public interest in free and open competition and immunity from those laws should be properly implied only when some equivalent mechanism is functioning to protect the public interest. Only if the SEC is actively and aggressively exercising its power of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended. Cf. *Hughes Tool Co.* v. *Transworld Airlines, Inc.*, 409 U.S. 363, 387-389 (1973).

> "The Court reviews at length the history of the SEC's involvement with fixed commission rates. In light of that history, I am satisfied to join the opinion of the Court and affirm the judgment below." 422 U.S. at 691.

Similarly, Mr. Justice Stewart states:

> "The Court has never held and does not hold today that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a "plain repugnancy between the antitrust laws and regulatory provisions". *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351." 422 U.S. at 692.

Mr. Justice Stewart, citing *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, viewed the question presented as whether the Exchange rules are "necessary to make the Securities Exchange Act work". Upon reviewing the legislative history of Section 19(b) and Congress' knowledge of exchange practices, he concluded that Congress considered fixed commissions to be in furtherance of that Act. 422 U.S. at 693. Here, Michigan's program of electric utility regulation works without the necessity for a light bulb program as evidenced by the stark fact that no other private utility in the State (or in the United States) has such a program. (Appendix 162a) Thus, the mere power to review or jurisdiction to regulate—which is the most that the Respondent and the *amici curiae* can demonstrate in the present case—is not enough of a basis to imply immunity.

The instant case lacks certain essential elements the Court found material in its 5 to 4 decision in *United States* v. *National Association of Security Dealers*, de-

cided the same day as *Gordon*. In NASD, the Appellant challenged the NASD's application of certain of its rules relating to dealer and broker operations in the secondary market for mutual fund shares. The Court noted that while the alleged violations were neither required by Section 22(d) relating to price of mutual fund shares nor authorized by Section 22(f), the conduct under attack was designed to suppress the same conduct which the SEC had consistently for thirty-five years restricted. The Court noted: "(T)his close relationship is fatal to the Government's complaint as the Commission's regulatory approval of the restrictive agreements challenged in Counts II-VIII cannot be reconciled with the Government's attack on the ancillary activities . . ." which it challenged. 422 U.S. at pp. 733-34. This close relationship between the activity attacked and activity which the SEC regulated in the exercise of considerable oversight was fundamental to the decision. Moreover, the Court noted that the SEC had repeatedly indicated that it weighed competitive concerns in the exercise of its continued supervisory responsibility (422 U.S. at p. 734) and that the history of the SEC's regulation of the industry "suggests no laxness in the exercise of its authority". 422 U.S. at 734. Finally, the Court, citing its decision in *Silver* v. *New York Stock Exchange,* found that the practice under attack was necessary to make the regulatory scheme work. 422 U.S. at p. 734. Thus, there is more than a difference in degree between the issues presented to the Court in the instant case and the issues which were presented in NASD. The differences are fundamental and the case therefore not controlling.

In sum, what the *amici curiae* are requesting (and what the Respondent impliedly seeks) is a new rule of law which would place state regulated utilities completely

outside the ambit of the federal antitrust laws. One might perhaps countenance such a result where the industry regulated *and the activity for which exemption was sought in particular* was under the close scrutiny of a federal regulatory agency specifically charged with responsibility for considering anti-competitive effects, and acting in pursuit of those responsibilities. To completely release the public utilities of this country from the antitrust laws and make their activities subject only to the vagaries of 50 different regulatory bodies and 50 different statutes as to anticompetitive effect seems, at the very least, ill advised.

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